(1)

Supreme Court, U.S.
FILED

02 350 SEP - 3 2002

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

JOHN SALVADOR, JR. and KATHLEEN A. SALVADOR,

Petitioners,

v.

THE LAKE GEORGE PARK COMMISSION; *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MADELINE SHEILA GALVIN
Counsel of Record
c/o Galvin and Morgan
217 Delaware Avenue
Delmar, New York 12054
(518) 439-7734
Attorneys for Petitioners

43 pp

QUESTIONS PRESENTED

1. Do the provisions of the Americans with Disabilities Act ("ADA") apply to State and State actors preventing such entities and persons from intentionally interfering with the provision of handicap access by private, non-governmental entities?

2. Do the decisions of the District Court and the Second Circuit Court of Appeals distort and improperly extend the holding of this Court in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356, 121 S. Ct. 955, __ L.Ed. 2d___ (2001)?

3. Does sovereign immunity or qualified immunity protect state officials and contractors from intentional conduct, which must be *ultra vires* in nature, preventing or interfering with citizen compliance with the ADA and violation the provisions of the ADA prohibiting such interference?

4. Does the First Amendment protect individuals from interference with the exercise of citizens seeking governmental redress through court proceedings?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioners: John Salvador, Jr. ("John Salvador"), an individual, and Kathleen A. Salvador ("Kathleen Salvador"), an individual, collectively referred to as "the Salvadors".

Respondents[1]: The Lake George Park Commission ("Commission"). Petitioners state that the Commission is a governmental body and part of the New York State Department of Environmental Conservation ("DEC"). Carl R. DeSantis, Sr. ("DeSantis"). Petitioners state that DeSantis is an individual and is or was the Chairman of and Member of the Commission. H. Gordon Burleigh ("Burleigh"). Petitioners state that Burleigh is an individual and is or was the Vice-Chairman of and Member of the Commission. Margaret Stewart ("Stewart"). Petitioners state that Stewart is an individual and is or was the Secretary/Treasurer of and Member of the Commission. Bruce E. Young ("Young"). Petitioners state that Young is an individual and is or was Member of the Commission. Thomas L. Wood ("Wood"). Petitioners state that Wood is an individual and is or was a Member of the Commission. Joan A. Robertson ("Robertson"). Petitioners state that Robertson is an individual and is or was the a Member of the Commission. E. Wilson Campbell ("Campbell"). Petitioners state that Campbell is an individual and is or was a Member of the Commission. James B. Neal ("Neal"). Petitioners state that Neal is an individual and is or was a Member of the Commis-

---

[1] As noted by the District Court at page 2 of its Decision and Order, the following were the only remaining defendants in the litigation, plaintiffs having voluntarily stipulated out the other initially named defendants. The Second Circuit decision at footnote 1 at page 2 thereof; however, did not note this fact.

sion. Anthony P. Reale ("Reale"). Petitioners state that Reale is an individual and is or was a Member of the Commission. John P. Cahill ("Cahill"). Petitioners state that Cahill is an individual and is or was the Commissioner of DEC and Ex-officio Member of the Commission. Sandra LeBarron, ("LeBarron"). Petitioners state that LeBarron is an individual and is or was the official Designee of the Commissioner of DEC to the Commission, and is or was the Special Assistant to the Commissioner of the DEC for the Adirondacks. Michael P. White ("White"). Petitioners state that White is an individual and is or was the Executive Director of the Commission. Molly Gallagher ("Gallagher"). Petitioners state that Gallagher is an individual and is or was an Environmental Analyst for the Commission. Martin Auffredou ("Auffredou"). Petitioners state that Auffredou is an individual and an attorney and is or was Counsel to the Commission, described by Respondents as a private contractor or provider of contract services. The New York State Department of Environmental Conservation ("DEC"). Petitioners state that the DEC is a governmental entity within the Executive Department of the State of New York, and the "parent" entity under which the Commission exists. (With the exception of Respondent Auffredou, all other identified Respondents are collectively referred to as "State Respondents").

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINION BELOW 1

JURISDICTION 3

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 15

CONCLUSION 30

APPENDIX

APPENDIX VOLUME I:

UNITED STATES CONSTITUTION, ARTICLE III 16a

UNITED STATES CONSTITUTIONAL AMENDMENTS 17a

UNITED STATES CODE 21a

STATE ADMINISTRATIVE PROCEDURE ACT 33a

CODE OF FEDERAL REGULATIONS 52a

ADA ACCESSIBILITY GUIDELINES FOR BUILDINGS AND FACILITIES 103a

APPENDIX VOLUME II:

ADA ACCESSIBILITY GUIDELINES FOR BUILDINGS AND FACILITIES, cont 140a

CERTIFICATION OF STATE AND LOCAL BUILDING CODES 268a

APPENDIX VOLUME III:

DISTRICT COURT DECISION 272a

TABLE OF AUTHORITIES

FEDERAL CASES

Airline Car Rental, Inc. v. Shreveport Airport Authority, (W.D.La. 1986) 667 F.Supp. 293 29

Anderson v. Creighton, 486 U.S. 635 (1987) 26

Atlantic Motel v. United States, 379 U.S. 241 30

Berman Enters, Inc. v. Jording, 3 F.3d. 602 (2d Cir. 1993) . 27

Biggs v. Best, Best & Krieger, (9th Cir. 1999)189 F.3d 989 . 26

Bogan v. Northwestern Mutual Life Insurance Company, (S.D.N.Y. 1997) 953 F.Supp. 532 29

Bowers v. Bethany MedicalCenter, (D.Kan.1997) 959 F.Supp.1385 23

Brewster v. Board of Education, (9th Cir 1998) 149 F.3d 971 27

Brody v. Village of Port Chester, 261 F.3d 288 (2d Cir. 2001) 22

Crawford v. Indiana Department of Corrections, (N.D.Ind. 1996) 937 F.Supp. 785, reve'd 115 F.3d 481 26

Does 1-5 v. Chandler, (9th Cir.1996) 83 F.3d 1150 25

Dube v. State University of New York, 900 F.2d 587 (2d Cir. 1990) 27, 28

Duffy v. Riverhead, (9th Cir. 1996) 98 F.3d 447 26

Farid v. Smith, 850 F.2d 917(2d Cir. 1988) 27

Ferguson v. City of Phoenix, (D.Ariz. 1996)
931 F.Supp. 688 24

Franco v. Kelly, 854 F.2d 584 (2d.Cir 1988) 28

Gagliardi v. Village of Pawling, 18 F.3d 188(2d.Cir.1994) 28

Gilbrook v. City of Westminster,177 F3d 839 (9th Cir 1999) 26

Graz v. Abbott Laboratories, (N.D.Ill. 1996)
940 F.Supp. 1227 23

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 27

Helen L. v. DiDario ,(3rd Cir.1995) 46 F.3D 325,
rehearing in banc denied, cert. denied
116 S.Ct. 64, 133 L.Ed.2d 26 24

Howe v. Hull, (N.D.Ohio 1994) 874 F.Supp 779 26

Innovative Health Systems, Inc. v. City of
White Plains, (S.D.N.Y. 1996) 931 F.Supp. 222,
aff'd in part 117 F.3d 37 (2d Cir.1997) 26

Innovative Health Systems, Inc. v. City of
White Plains, (2d Cir. 1997) 117 F.3d 37 ..... 24, 26

Jackson v. West Indian Co., Ltd., (D.Virgin
Islands 1996) 944 F.Supp. 423 29

Judice v. Hospital Services District No. 1,
(E.D.La. 1996) 919 F. Supp. 978 25

Katzenbach v. McClung, 379 U.S. 294 30

Kilcullen v. New York State Department of Labor, (2d Cir. 2000) 205 F.3d 77 26

Kornblau v. Dade County, (C.A.11, 1996) 86 F.3d 193 22

Malley v. Briggs, 475 U.S. 335(1986) 27

Maryland v. Wirtz, 392 U.S. 183 30

Muller v. Costello, (2d Cir. 1999) 187 F.3d 77 26

New York State Trawlers Association v. Jorling, 16 F.3d 1303 (2d Cir. 1994) 21

Northern Securities Co. v. U.S., 193 U.S.197, 24 S.Ct. 436 (1904) 30

Ostrach v. Regents of the University of California, (E.D.Cal. 1997) 957 F.Supp. 196 22

Palazzolo v. Rhode Island 533 U.S. 606, 121 S.Ct. 2448 17-20

Paralyzed Veterans of America v. D.C. Arena L.P., (C.A.D.C. 1997) 117 F.3d 579, 326 U.S.App.D.C. 25 24

Pennhurst State School & Hospital v. Haldeman, 465 U.S. 89, 104 S.Ct 900 (1984) 27

Quartararo v. Catterson, 917 F. Supp. 919 (E.D.N.Y. 1996) 27

Rourke v. N.Y. State Dept. of Correct.
Services, 915 F.Supp. 525 (N.D.N.Y. 1995) 27

Shultz By and Through Shultz v. Hemet
Youth Pony League, Inc.
(C.D.Cal. 1996) 943 F. Supp. 1222 25

Saunders v. Horn, (E.D.Pa. 1996) 959 F.Supp. 689 25

Scheuer v. Rhodes, 416 U.S. 232,
94 S.Ct. 1683 (1974) 27

Sterling v. Constantin, 287 U.S. 378,
53 S.Ct. 190 (1932) 15

Board of Trustees of the University of Alabama
v. Garrett, 531 U.S. 356, 121 S. Ct. 955 .... i, 16, 17, 26

Town of Hallie v. City of Eau Claire,105 S.Ct.1713,
471 U.S. 34, 85 L.Ed.2d 24 (1985) 29

United States v. Aluminum Co. of America,
(2d Cir. 1945) 148 F.2d 416 29

Williams v. Ohio Department of Mental Health,
(S.D.Ohio 1997) 960 F.Supp. 1276 26

Yeskey v. Commissioner of Pennsylvania
Dept. of Corrections, (3rd Cir. 1997)
118 F.3d 168 24-25

STATE CASES

Brody v. Leamy, 393 N.Y.S.2d 243(N.Y.Sup. 1977) 27

Dunham's Bay Boat Co. and Frank J. Parillo v.
Town of Queensbury Planning Board,
(S.Ct. Warren County) CCN 56-1-99-0174,
Index No. 33303 ..... 6, 8

Lake George Park Commission v. Salvador,
(S.Ct Warren Co) Index No. 37573 ..... 6, 7, 9, 15

UNITED STATES CONSTITUTION

Article III 3, 12

Amendments:
First Amendment 3, 7, 28
Fifth Amendment 3, 18, 20
Eleventh Amendment 3, 23, 26-28
Fourteenth Amendment 3, 18, 26
Due Process 3, 13, 18
Equal Protection 3, 14, 20

FEDERAL STATUTES

15 U.S.C. § 1 ..... 3, 29

15 U.S.C. § 2 ..... 3, 29

28 U.S.C. §§ 1331, 1343 3

28 U.S.C. §1291 3

28 U.S.C. 1254(1) 3

42 U.S.C. § 1983 3

42 U.S.C. § 1988 3

Americans with Disabilities Act (ADA)
General . . . i, 3, 8, 9, 10, 15, 17, 22, 23, 24, 25, 26, 28, 29, 30
and
42 U.S.C. §§ 12101, *et seq.* 3, 23, 24

42 U.S.C. § 12181 . . . . . 3, 24, 28

42 U.S.C. § 12181(7)(A) 24, 28

42 U.S.C. § 12202 . . . . . 3, 23

42 U.S.C. § 12203 3

42 U.S.C. §§ 12203(a) and (b) 3, 15, 17

FEDERAL RULES

Federal Rules of Civil Procedure, generally 2

United States Court of Appeals for the Second
Circuit, Local Rules:
Local Rule 28 2

FEDERAL REGULATIONS

28 C.F.R. Part 35 16

28 C.F.R. Part 35, § 152 16

28 C.F.R. Part 36, *et seq.* 3, 16, 26, 28

28 C.F.R. Part 36, §§ 501, *et seq.* 28

28 C.F.R. § 36.104 28

STATE STATUTES

New York State Statutes
Environmental Conservation Law,
Article 43 1
State Administrative Procedure Act
General (§§ 101, *et seq.*) 11, 13
§ 204 11

OTHER AUTHORITIES

Department of Justice, A Guide to Disability Rights 25

Department of Justice, Certification of State and Local Building Codes, www.uddoj.gov/crt/ada/certcode.htm 24

New York State Department of Environmental Conservation, Lake George Park Commission, Resolution 98-69 ..... 11, 12, 21, 22

PETITION

John Salvador, Jr. and Kathleen A. Salvador, Petitioners, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

This is a dispute over a validly vested property right in a non-revocable Class A Marina Permit ("Marina Permit") issued to Petitioners by Respondent DEC and later attempted to be first limited and then revoked by the Commission, the successor arm of the DEC designated to handle matters involving the Lake George park area. Other similarly issued Marina Permits were treated by the Commission as property rights which run with the land. It involves the refusal of the Commission to allow use of a Handicapped and Emergency Access facility ("Handicap Access") installed after all required permits had been obtained by Petitioners to comply with Handicap Access to recreational facilities for Petitioners' guests, members of their Dunham's Bay Boat and Beach Club ("Boat Club") and for use by emergency service providers for rescues and practice. Petitioners sought to provide proper handicap access, but are prohibited by the Commission from allowing the handicapped to use that access, leaving only access across Petitioners' sandy beach.

The dispute also involves issues of intentional targeting of Petitioners for desperate treatment and denial of equal protection and due process for the exercise of their First Amendment rights, among others. The governing legislation is New York State Environmental Conservation Law, Article 43, under which the Commission operates.

This action was commenced in Federal District Court, Northern District of New York with Complaint dated and filed

December 23, 1998. (Hon. Frederick Scullin, Jr.) Petitioners herein had attempted to remove to the District Court an enforcement action brought by the Commission against Petitioners and their corporation, in New York State Supreme Court shortly after Appellants commenced this action. A *pro se* defendant named in that action failed to consent resulting in remand. Issue was joined with service of an Answer by Respondents dated February 5, 1999. While before the District Court, between May 1999 and March 2000, the parties engaged in settlement negotiations relating to both actions which failed. Respondents moved for judgment on the pleadings which was granted by District Court March 28, 2001, filed March 29, 2001.

The Salvadors appealed to the Second Circuit Court of Appeals for the Second Circuit ("Second Circuit"). (Notice of Appeal April 26, 2001). Petitioners filed one (1) brief with the Second Circuit in support and thereafter were served with two briefs one on behalf of all Respondents except Auffredou; the second served was on behalf of Respondent Auffredou. Petitioners timely filed one (1) response addressing that filed by all Respondents excluding Auffredou, and a second responding to that filed by Auffredou. By letter dated January 24, 2002, the Second Circuit notified Petitioners that they were they were "Not allowed to file two separate sets of briefs". [Copy set forth in Appendix]. Petitioners sought to locate the authority for such limitation in either the Federal Rules of Civil Procedure (FRCP) or the Second Circuit's Local Rules and located none. The closest reference found is Local Rule 28, Briefs (c) Reply Brief, which does not appear to set forth such limit and (i) Briefs in a Case Involving Multiple Appellants or Appellees, which also fails to set forth such limitation. Petitioners sought "appeal" unsuccessfully from this determination and were left with allowance of only one(1) such response, resulting in submission of only the Petitioners' brief responding to the brief of all Respondents other than Auffredou. The Second Circuit's disallowance of Petitioners'

Brief addressing Auffredou's arguments led to that Court's determination that Petitioners' arguments were raised "only obliquely" in the allowed Reply Brief (Decision, footnote 2) and other references. The Second Circuit affirmed the decision of the Court below by decision dated April 26, 2002. Petitioners sought panel rehearing and a rehearing en banc. Both petitions were denied by Order dated and filed June 3, 2002.

JURISDICTION

Subject matter jurisdiction for the United States District Court for the Northern District of New York is found in 28 U.S.C. §§ 1331, 1343. This action charges violations of Petitioners' Constitutional rights by Respondents under the First, Fourth, Fifth and Fourteenth Amendment of the United States Constitution and for damages and fees under 42 U.S.C.§§ 198 3, 1988. 42 U.S.C. §§ 12201 *et seq.* and 12203(a) and (b)*et seq.*

Subject matter jurisdiction for the Second Circuit Court of Appeals was invoked through 28 U.S.C. §1291.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS INVOLVED

United States Constitution Article III
Amendments I, IV, V, XI, XIV
15 U.S.C. §§ 1, 2 *et seq.*
42 U.S.C. § 1983 *et seq.*
42 U.S.C. § 1988
Americans With Disabilities Act, 42 U.S.C. 12101 *et seq.*
42 U.S.C. § 12202; 42 U.S.C. § 12203
42 U.S.C. § 12181 *et seq.*
New York State Administrative Procedure Act (SAPA)
SAPA §§ 100, *et seq.* § 202 *et seq.*, § 204 *et seq.*
28 C.F.R. Part 36
28 C.F.R. Parts 35 and 37

STATEMENT OF THE CASE

A. General Background and Description

The Salvadors purchased property located on Lake George, New York, during the 1970s, including an operating marina situated on their property extending beneath the flood waters of Lake George and abutting its waters. In the 1980s, the DEC enacted regulatory provisions impacting operation of marinas on Lake George with which the Salvadors duly and timely complied. The DEC issued the Salvadors a Permit to operate a marina on Lake George. [See Lodging, L-1] The DEC permit did not have a term or expiration date. The Salvadors operated under and by virtue of the DEC Permit continuously, without any break in time or type of service offered and continue to do so to date. Prior to the issuance of the Salvadors' Marina permit by the DEC, in 1961 the Commission was established within the DEC. As part of the DEC the Commission had actual and constructive knowledge of the DEC Permit issued to the Salvadors. In 1996 the Commission told the Salvadors that they were required to apply for an "Update/Renewal" of their existing DEC permit, purportedly based on regulations adopted in 1988, after the issuance of the Salvadors' preexisting DEC Permit which established the base measure of the Salvadors' property rights with respect to such permits. The Salvadors complied with the Commission's application request and had numerous meetings with representatives of the Commission attempting equitable resolution of the permit issue. Those attempts ceased when the Commission refused to recognize the validity of the Salvadors' preexisting DEC Marina Permit. The Commission informed the Salvadors that it unilaterally was reducing the scope and number of uses allowed to the Salvadors if the Commission decided to grant any Marina Permit to the Salvadors. Initially during the "Updating" process, the Commission and its staff contended that in no other case involving operation of a marina on Lake George did it recognize the existence of a pre-existing DEC permit and claimed the Salvadors were afforded the same treatment as

given to all other applicants before the Commission. That was untrue. Three (3) types of permits were available to commercial uses on Lake George: the original continuing DEC Permits; Class A Marina Permits; and Class B Marina Permits. During ongoing attempts to resolve disputed issues, the Salvadors received another application form from White.[See Lodging, L-2] That form on its face included the category of "Update / Renewal" of an existing DEC Permit. The lower courts denied the Salvadors discovery and they therefore cannot determine the precise number of applications of this type accepted by the Commission. It was a classification selection denied the Salvadors by the Commission. The Commission's prejudicial and discriminatory actions with respect to the Salvadors went so far that Auffredou stated on public record that the Commission should require the Salvadors be named individually on any permit issued by the Commission so their personal assets could be reached, beyond the assets of the actual applicant corporation when, not if, the Commission moved against the Salvadors in an enforcement action. One member of the Commission noted other similarly situated corporate applicants, even one considered at the same meeting, were not compelled to comply with that requirement. There can be no equivocating interpretation of the unambiguous statement on the record by Auffredou. The clear facial meaning of the publically stated words are part of the Commissions' public records.

During 1999 the Salvadors obtained necessary approvals for construction of a Handicap Access at their marina. This facility was approved by the Town of Queensbury, and its Planning Board. The Salvadors went through the prescribed regulatory process and obtained the permits and approvals including County Planning Board, Army Corps of Engineers, APA, and DEC, which specifically authorized the work to proceed. The Commission was placed on notice by the Town of the process but failed to participate. After the Town issued permits, neighboring property owners commenced litigation

attempting to have the permits rescinded. The Salvadors and the Town were named in that action in State Supreme Court. The Salvadors sought to join the Commission as a necessary party. The State Court denied that motion to join, but determined the permits had been properly granted by the Town and specifically held that the Handicap Access was not an expansion of the Salvadors' marina facility. [Copy of Decision Set Forth in Appendix]. Not until the facility was substantially completed did the Commission seek and obtain the TRO in May 2000, prohibiting completion and use. The TRO remains in effect with no hearing having been held to take testimony and no evidence received. The Commission failed to cooperate with discovery requests in that matter and requests for judicial action remain unanswered.

B. Procedural Background and Issues

This action is premised on discriminatory enforcement, application and handling of administrative and regulatory matters by the Commission relating to the Salvadors. The Commission's handling of the Salvadors' "application" for a Class A Marina Permit was discriminatory, different from the way other similar applications were handled by Commission. The Commission's failure to acknowledge or accept the scope of the Salvadors' preexisting DEC Marina Permit as "grandfathering" the scope and extent of the Salvadors' marina operations is in conflict with applicable laws, rules and regulations and in direct contradiction in the handling of other similar Marina Permit applications by the Commission.

The Salvador are prohibited by the Commission from completing and operating a Handicap Access constructed by the Salvadors solely for the use of the members of their Boat

Club (and at the time overnight guests[2] of their Lodge), and local emergency, fire, ambulance and rescue services which used the unimproved sandy beach area for rescues and practice. In May 2000, the Commission obtained the TRO preventing the Salvadors from competing and operating the Handicap Access. The Salvadors attempted to oppose this in State court and sought judicial subpoenas for State witnesses for hearing on the TRO; the Commission moved to quash. No decision has been made on the subpoenas; no hearing held on the underlying TRO. The Salvadors have no legal recourse which is aggravated by shifting of the State case from judge to judge, most recently in mid-2001.

The record contains numerous specific instances where the Commission and Auffredou acted in a manner known by them to intentionally violate the Salvadors' Constitutionally guaranteed rights. Those actions are deliberate and intentional: Despite lack of discovery, the Salvadors met their burden to defeat the motion below. The Salvadors note that the decisions below, particularly the Second Circuit's, without stating a basis or reason, addressed only the content of the amended complaint [See Appendix] ignoring the content of affidavits submitted by and on behalf of the Salvadors and accompanying exhibits, which establish the validity of the Salvadors' claims, and are part of the Record.

C. Respondents' Actions were Motivated by Personal Animus, due in part to the Salvadors' Prior Pro Se Actions and exercise of First Amendment Rights.

The Commission argues that the Handicap Access is a "boat ramp" and as such is "prohibited" by the Commission

---

[2] The Salvadors sold the Lodge, closing in March 2001, but retained the Marina and other property. At all relevant times, the Salvadors owned and operated the Lodge. The term "guests" or similar, used herein relates to the time the Salvadors owned and operated the Lodge.

regardless of its nature as an access facility for the members of the Boat Club. The Commission allows its documented animus against the Salvadors to spill over into its decision making process, causing harm not only to the Salvadors, the intended targets, but extending to harm handicapped persons who otherwise would be able to enjoy the State owned Lake, and persons whose employment was made more difficult due to the inability to use this facility intended to accommodate handicapping conditions. The Salvadors acted in good faith in the capacity of owners of a facility which has handicapped members who experienced difficulty in achieving full enjoyment of both the facilities and Lake George. For years, with the Salvadors' consent, local fire and rescue operations had access to the Lake in emergency situations on the Salvadors' property. The facility at issue was and is to be offered by the Salvadors to such emergency services along with a dry hydrant they installed to facilitate use in emergency circumstances. The Salvadors have had handicapped persons in their employ, this facility would improve use and access to the Lake for handicapped employees. The improvement of the area to include the Handicap Access, however, was not initiated as a result of any employment litigation pending or threatened, just knowledge of the expansion of the ADA to include recreation facilities and an intent to bring the facilities into compliance. The improvement at issue has been judicially determined by State Supreme Court decision which was not appealed, [See Appendix] not to be an expansion of any use, nor a new use as the Commission argued. The Salvadors had not anticipated that attempting to comply with the ADA and provide better access for their handicapped members and employees would be opposed by anyone. Since their neighbors who brought the State Court action are competitors in the marina business, that challenge had the cover of a business issue. The challenge by the Commission not only is unfounded and based on bias, but also violates the rights and protections afforded the identified class of handicapped persons intended to benefit by its

installation. The Commission's attack on the Salvadors spills over into violation by the Commission of the ADA. The Commission is the wrongdoer casting a shroud intentionally obstructing use and enjoyment of Lake George by members of the public who suffer from handicapping conditions, further restricting the access to the lake from those the Commission members apparently view as the "unwashed masses".

The Salvadors do not provide services to any persons other than their guests, members, rescue workers and employees. In *Lake George Park Commission* v. *Salvador*, State Supreme Court, Index No. 37573, the Commission, argued in support of their application for the TRO prohibiting completion and use of the Handicap Access. The Commission avered at some possible, unspecified future date the Handicap Access conceivably could be opened to anyone, making Lake George more accessible for use by handicapped members of the general public, "MR. RAPPOPORT[3]: ... [T]he Commission has the authority to seek injunctive relief in Court. It need not establish irreparable harm, but, . . . as we explain . . ., the likelihood of such ***harm could result if the use of the ramp were open to the members of the public.***" [Emphasis added]. The Commission argued, "MR. RAPPOPORT: . . . - has had to be determined by the Commission, because the Commission was going forward on the records before of ***a lack of confirmation that the rules of membership would never change to allow members of the public to join the Club.***" [Emphasis added]. The TRO was granted bestowing judicial imprimatur on the Commissions' position and guaranteed future limitation of use of the Handicap Access assuring prohibition of use, "MR. RAPPOPORT: .

---

[3] Quotations are from Transcript of Oral Argument set forth in the Record below. Attorney for State plaintiffs in the State Court enforcement action commenced by Appellant Commission after Appellants' filing and commencement of the instant action, hereinafter "AAG" or "AAG Rappoport".

. . the Salvadors were informed that there were no design criteria that the Commission had for the construction of the ramp. But Mr. White pointed out at the same time ***there were use limitations on the ramp."*** [Emphasis added].

The Commission's intentional prohibition of completion of the Handicap Access prevents the Salvadors' recreational facilities from being ADA compliant accessible to handicapped patrons and employees. The Commission's arguments of fear of possible future increased accessibility by members of handicapped public to the Lake and for limitation of access to the Lake, claimed by the State under its sovereign powers, flies in the face of the laws they, as public servants, are sworn to uphold, protect and defend. Many of the named Respondents have personal vested interests in limiting access to Lake George, as residents of the area or property owners along Lake George. Respondents allowed their stated personal animus for the Salvadors to interfere with their responsibility to the public and their duty to adhere to the law.

D. Respondents Acted to Revoke the Salvadors' Marina Permit Knowingly and in a Conspiratorial Manner Intended to Cause Harm to the Salvadors.

The Commission abetted by Auffredou made a negative determination with respect to the Salvadors' application which had been formally and in writing withdrawn by the Salvadors. The manner in which the Commission proceeded denied the Salvadors' right to a hearing and a full record upon which to base their claim for relief. The Commission reached "findings", as communicated by staff to the Salvadors, which constituted a determination of the Commission. Not only are individual members of the Commission presumed to know and have the duty to know the "rules of the game" in which they participate, determining who shall benefit from favorable decisions and who shall not, but have at their disposal counsel for their meetings, available to them for their deliberations,

and an active participant in the Commission's process their Counsel, Auffredou. The Commission possessed actual knowledge of the implications of their actions, any other conclusion would require their removal for presumptive incompetence.

The Commission exceeded its authority issuing a "declaratory ruling" on its rules and statutes which it deemed applicable and within the scope of its enforcement obligations. The Commission and Auffredou knew or had a duty to know the impact of their action as well as the applicable provisions of the State Administrative Procedures Act, ("SAPA"), on declaratory rulings. Analysis of the concept of declaratory ruling by the Commission was necessary and required. This concept eluded the Commission. Under SAPA § 204, administrative agencies, including the Commission are permitted in certain instances to make, declaratory rulings; however, where the equivalent of a "declaratory judgment" is rendered by the administrative agency, a justiciable controversy exists; judicial review is necessary and proper. The Commission's action on the Salvadors' application establish basis for challenge and established that the property rights, rights to Due Process and other enumerated rights of the Salvadors were and are jeopardized, proving existence of justiciable issues.

Absent proof the Commission and Auffredou were collectively transported into irrationality in a sudden *X Files* moment, it is presumed that these public officials acted in a rational state of mind. A "reasonable" official sitting in the position of Respondents would have known that the actions violated the Salvadors' rights. When the Commission acted on the Salvadors' application adopting Resolution No. 98-69 dated September 29, 1998, it acted despite the fact the application was first withdrawn on April 29, 1998, and subsequently withdrawn in writing to the Commission prior to the date of the Resolution. The Commission in that Resolution acknowledged DEC issued Appellants' facility a marina permit, but found ".

. . the continued operation of the subject facility ***without a Class A marina permit from the Commission*** is a violation of Commission regulations, . . .". [Emphasis added] and ". . . the NYSDEC marina permit for the subject facility was superseded by the enactment of the Commission's regulations applicable to Class A marinas on June 3, 1988, . . ." The Resolution did not attempt to justify the alleged "superseding" of the existing DEC Permit previously granted to the Salvadors in which the Salvadors have a valid property right, nor did it attempt to allege any notice to the Salvadors of the "suspension" of or elimination of their pre-existing rights. The Resolution found the Commission, ". . . acknowledges that the NYSDEC permit may be utilized to establish a baseline level of marina activity offered at the subject facility which would form the basis of a Class A marina permit from the Commission . . .", but failed to admit the Salvadors' existing continuing permit from DEC allowing them to operate as legally authorized permitted and approved by the appropriate permitting entity. The Commission's actions prove full knowledge of their consequences. The Commission and Auffredou also knew or should have known as public servants, that their actions improperly wielding the power of the Commission over the Salvadors would cause the Salvadors actual harm which they suffered and continue to suffer. The Commission and Auffredou knew what they were doing when they proceeded against the Salvadors. Their acts were intentional, with knowledge of their intended results as established by their subsequent argument that the Amended Complaint failed to present a "case or controversy" under Article III of the Constitution. The Commission argued an administrative procedure had not been followed, divesting the Salvadors of standing. The Commission's calculated actions were undertaken in a manner intended to give them this argument if faced with a court challenge and they knew or were advised by Auffredou, that administrative proceedings such as the Commission's, while not required to adhere to all technical requirements of a fair trial, must not violate the fun-

damentals required for fair hearing. The Commission cannot ignore basic principles of Due Process. The Commission knew the Salvadors never waived the right to Due Process or application of SAPA required for the Commission to proceed. The Salvadors "withdrawal"of their application resulted solely from the Commission's illegal, improper acts during the administrative process which established that proceeding would be futile, "exhaustion of administrative remedies" need not be fulfilled where, as here, to proceed further would be futile.

E. Auffredou should be held to a Higher Standard of Conduct than Applicable to Non-Attorney Respondents.

At the Commission's April 29, 1998, public meeting Auffredou strongly recommended that the Commission require that the Salvadors be named personally as "landowners", applicants and be the holders of any Class A Marina Permit issued. Auffredou made this statement with respect to the Salvadors specifically, targeting them for different, harsher treatment than that afforded other applicants before the Commission. The Commission did not impose that requirement other applicants or permittees. Auffredou stated if, ". . . there are problems down the road where the Commission has to get involved with somebody for an enforcement matter or litigated matter, my advice to you is to have the landowner for the purposes of legality, the landowner name has to be included." On the record, one (1) member of the Commission acknowledged the discriminatory treatment of the Salvadors, addressng Auffredou, "Martin, we just issued one to the Flamingo Restaurant on Lake George, and we didn't require George Pestinak's name. Is there any, what's the difference . . . "

Auffredou's actions, motives, and influence as a policy maker, must be scrutinized to make necessary factual determinations. Auffredou, an attorney and officer of the court, is held to a higher standard than other Respondents in determining his level of "knowing" conduct and culpability.

F. The Commission's Actions were Taken with Advice of Available Counsel; the Members Actions Violating the Salvadors' Rights were Knowing and Intentional.

Respondents intentionally acted to deprive the Salvaors of their Constitutional rights while acting under color of law. State versus private action issues impact the level of knowledge and knowledge of the consequences of their acts, required of the Commission as well as the level imputed to them or inferred from their actions. There is no way in the face of the established facts that Respondents' actions could have been committed without both knowledge and the intent. The Commission, its Members and Auffredou conspired to deprive the Salvadors of their Constitutional rights. With the elements of conspiracy are established, the prerequisites of knowledge and intent necessarily flow therefrom. Respondents, acting under color of law and in concert with each other, deprived the Salvadors of their Constitutional rights, including Equal Protection. The record establishes an existing animus and bias against the Salvadors on the part of the Commission and Auffredou. The record also establishes that this targeting of the Salvadors by Respondents was, in part, due to the Salvadors' prior use of *pro se* litigation seeking redress of grievances to the judicial system as they are allowed under the Constitution. The Record establishes prejudice against the Salvadors resulting from their affiliation with other *pro se* litigants with whom the Commission and Rappoport expressed disdain, publically stating those actions should not be allowed.

REASONS FOR GRANTING WRIT

There is no avenue of escape from the paramount authority of the Federal Constitution when there is a substantial showing that the exertion of state power has overridden private rights secured by the Constitution. [Emphasis added] *Sterling* v. *Constantin*, 287 U.S. 378, 397-398, 53 S.Ct. 190 (1932).

I. THE ADA MUST APPLY TO STATE AND STATE ACTORS INTENTIONALLY ACTING TO INTERFERE WITH AND TO PREVENT PROVISION OF HANDICAP FACILITIES AND ACCESS BY PRIVATE, NON-GOVERNMENTAL ENTITIES AND PERSONS.

A. The State and State Actors can and have violated the non-interference provisions of the ADA.

Here the governmental actors are guilty of the acts in violation of 42 U.S.C. §§ 122203(a) and (b), including interference, coercion or intimidations "on account of his or her having exercised or enjoyed, or ***on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act***". [Emphasis added]. This is not a conclusory statement. The Commission obtained a TRO (supposed to be temporary). In the argument Rappoport, for the Commission, specifically stated the Commission did not want access to be available to what it averred to be an unidentified number of handicapped persons who might, in the future, use the Handicap Access facility. This is stated on the record; it is not a conjecture, although it contains the Commission's conclusory assertions relating to future use; it is not an argument dreamed up as a result of legal research; rather, it is the Commission's stated position before a court of record. The Commission's fears of possible unfettered access to Lake George by handicapped persons is a fact. While the lower court made much of the fact the Salvadors failed to allege that they currently had handicapped employees and guests or Boat Club members, this is a

factual question which should not have been decided on the pleadings. Even on the pleadings, the Salvadors statements establish the basis for their claim. The Salvadors Affidavits submitted and in the Record clearly establish the marina business is a seasonal business. At specific times the Salvadors have Boat Club members, guest and/or employees who have handicaps. These persons are not at the Salvadors' facilities at all times. They are there at various times during the "season". The Salvadors have very carefully stated in their affidavits what the facts were at the time at which their affidavits were signed. That does not mean that the day or week before or the day or week after such handicapped persons were not present at the facility. Given treatment of the Salvadors by the Commission, these statements were made with extreme and explicit accuracy to avoid any possible misconstruction of the words.

The Department of Justice published proposed rules to amend the regulations in 28 CFR Part 35, 36 and 37, *Federal Register*, June 20, 1994, thereafter adopted, setting standards for "Nondiscrimination on the Basis of Disability in the State and Local Government Services; Public Accommodations and Commercial Facilities; Accessibility Standards" in 28 CFR Part 36, *et seq.* Accessibility standards adopted established only ***minimum*** standards required by law to be met; § 35.152 Alterations: General, expanded the definition of "alteration" adding language mandating compliance in all but the most unusual and effectively prohibitive situations. The Salvadors attempted to comply with accessibility to their recreation facilities, and established that such compliance was not only feasible, but capable of successful implementation without expanding the already existing facilities and through utilization of materials compatible with the existing environment. *Garrett, supra,* cannot and should not be contorted and tortured by semantic games to encourage the perpetuation of barriers to access by the handicapped. The perpetuation of handicapped barriers should not result from a State bureaucracy's application of

stated animus against specific private citizens.

B. The Second Circuit Improperly Affirmed the District Court's Determination that ADA §§ 12203(a) and (b) Do Not and Cannot Apply to States.

The District Court held §§ 12203(a) and (b) "cannot" apply to states on the grounds that to hold otherwise would "abrogate their sovereign immunity". The Court cited *Garrett, supra,* as the foundation for that determination, noting the Salvadors "do not cite any legal authority" for their position. Neither did either lower court cite other authority for their position. The Salvadors cannot cite such legal authority since none exists, and that is one of the Federal issues the Salvadors seek this Court to resolve.

II. THIS COURT'S DECISION IN *BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA* v. *GARRETT,* 531 U.S. 356, 121 S. Ct. 955, __ L.Ed. 2d___ (2001) WAS IMPROPERLY APPLIED AND EXTENDED BY THE LOWER COURTS.

A. *Garrett* is Limited to ADA Claims against a State Brought by Employees for Violations of ADA Employment Matter.

Garrett addressed application of the ADA to actions brought by employees against a state as employer. *Garrett's* language did not apply, nor does it logically extend, to a factual scenario which is not predicated upon ADA violations in employment of a plaintiff by a State.

The extension by the lower Courts of the holding in *Garrett, supra,* defeats the legislative purposes of the ADA, circumventing the rationality test required for evaluation of actions under the act and allowing the Commission to escape the consequences of the factually established *ultra vires* actions.

B. The Holding in *Garrett* Must be Interpreted and Applied in Light of the Subsequent Decision in *Palazzolo* v. *Rhode Island* 533 U.S. 606, 121 S.Ct. 2448, _ L.Ed2d _ (2001).

This Court's decision in *Palazzolo* v. *Rhode Island, supra,* reviewing a lower court decision involving violation of the Fifth Amendment Takings Clause applied to States through the Fourteenth Amendment Due Process Clause considered private property rights. In *Palazzolo,* similar to the submission and later withdrawal of the application for a Class A Marina Permit to the Commission, a property owner applied on at least two separate occasions for relief from regulations dealing with protection of coastal wetlands. Similarly to the Salvadors, it was claimed that the private property owner should be denied judicial relief for failure to pursue all possible administrative alternatives conceivably available for relief. This Court noted in *Palazzolo, supra,* under the existing statute and regulations, it was highly unlikely that the private property owner would be successful pursuing administrative remedies no matter how often he applied for such relief. Given the statements made, including Auffredou's, the Salvadors faced the fact that for them too, no matter how often they applied for relief requested, none would be granted.

The statutory scheme in *Palazzolo* is similar to the Commission and its regulations as presented here to be clearly applicable to regulatory conundrum in which the Commission and Auffredou placed the Salvadors. The same type of regulatory machinations existed to thwart the Rhode Island property owner as have been concocted for the operations of the Commission. The impossibility of compliance with regulatory hurdles artificially created by the Commission and additional "special" barriers invented by them for the Salvadors only, by their very nature are so narrow as to target with pinpoint accuracy the Salvadors' marina, creates a regulatory environment in which, regardless of, if or how often the Salvadors applied for and pursued the permit and relief sought, it would be held permanently in the bureaucratic purgatory of the Commission's review and denial process.

Palazzolo, failing to obtain any administrative relief, proceeded to the courts. This Court addressed two key questions, first, ripeness of the controversy for judicial review, and second, the claim of takings with respect to after acquired (post-statutory enactment) property. The issue or ripeness has been a consistent hurdle for the Salvadors. This Court held, "The rulings of the Council interpreting the regulations at issue, the briefs, arguments and candid statements by counsel for both sides, leave no doubt .... Further permit applications were not necessary to establish this point." *Palazzolo, supra.*

This reasoning is precisely applicable here, as does this Courts analysis and holding the, "Ripeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use." *Palazzolo, supra,* at 2460.

> Where the state agency charged with enforcing a challenged land use regulation entertains an application from and owner and its denial of the application makes clear the extent of development permitted, and neither the agency nor a reviewing state court has cited non-compliance with reasonable state law exhaustion or pre-permit processes, . . .,federal ripeness rules do not require the submission of further futile applications with other agencies. *Palazzolo, supra,*[Citation omitted] 2461-2.

This Court evaluated the situation stating:

> The State may not put so potent a Hobbesian stick into the Lockean bundle. . . . . Just as a prospective enactment . . ., can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enact-

> ments are unreasonable and do not become less so through the passage of time or title. Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, . . . ,to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land. *Palazzolo, supra,* 2462-3.

The argument in *Palazzolo* is just as applicable here. The "crumb" tossed to the Salvadors in the guise of a "permit" bears little resemblance to the DEC Permit under which they have operated and continue to operate. The levels of entitlement and the scope of property rights with respect to their marina permit were established with the issuance of the original DEC permit. Later enacted or adopted regulations otherwise applicable to reduce the scope of the Salvadors' operation, could not be applied without addressing the grandfathered status of the operations which the Salvadors rightly claim under their original and continuing non-revocable DEC permit. To determine otherwise subjects the Salvadors to an *ex post facto* law prohibited by the Constitution.

The Second Circuit hinged its decision with respect to Equal Protection and procedural Due Process upon the withdrawal by the Salvadors of their application from consideration by the Commission, thereby in the Second Circuits' opinion, placing themselves in a unique category with no other applicants being "similarly situated". This reasoning completely ignores *Pallazzo.* The Salvadors first verbally withdrew their application at the Commission's April 29, 1998, meeting, at which Auffredou's statement on the record of discriminatory intent in dealing with the Salvadors' applica-

tion was specifically stated. Attempting to proceed despite Auffredou's statements, the Salvadors consented to further good faith negotiations with the Commission staff and Auffredou. This resulted in further desperate treatment of their application, with the factual established representations made that the Salvadors' matter would not be before the August 19, 1998, Committee, but deferred to the Committee's meeting on September 23, 1998, nor would it be considered by the Commission at its meeting on September 23, 1998, allowing the Salvadors time for submission of further supporting documentation. When the Salvadors' belatedly learned that this was an untrue representation they again withdrew their application from consideration, this time in writing. The Commission refused to honor the withdrawal and issued Resolution 98-69.

The Second Circuit specifically held a permit is not a property right. The Court stated that the Salvadors "concede that they had only a permit". While on its face, the words are correct, taken out of context this incorrectly translates into a purported concession by the Salvadors that they had no property right flowing from their non-revocable DEC Class A Marina Permit, something the Salvadors never conceded. The comparison of the DEC permit to and equating it with a "license" of the type forming the basis of the decision in *New York State Trawlers Association* v. *Jorling*, 16 F.3d 1303 (2d Cir. 1994), on its face is erroneous. The lobster fishing "licenses" considered those as "permits" and involved allowance of a specific activity on other than the lands of licensee in coastal waters. Such "permit"or "license" cannot run with the land, must be specific to the "permittee" or "licensee" and is a regulatory scheme in no way comparable to that engaged in by the Commission. As set forth in specific factual detail in the affidavits submitted by the Salvadors and in the record, the Commission consistently has determined that other Class A Marina Permits (Parillo permits flowing from his predecessor in title, Ellsworth) run with the land and allowed prior Alison

Ellsworth and Robert Ellsworth marina permits to flow to Parillo as successor in title. There can be no doubt that had the Salvadors' submissions below been taken at some value (even not in the light most favorable to the non-moving party), the courts could not find other than these specific permits, Class A Marina Permits issued by the DEC, run with the land and therefore, must constitute at least some form of property right and interest. The Salvadors' marina is uniquely situated, with docks and berths situated on land currently inundated by the flood waters of Lake George, but, as detailed in the Record, legally titled in the Salvadors holding fee title. The treatment of change in permit regulation as similar to that of licensing of lobster fishermen is totally unjustified and unfounded as is the finding that the Salvadors' Class A Marina Permit issued by the DEC "on its face expired on December 31, 1989." The Salvadors respectfully request that this Court arrive at is own conclusion examining the face of the document at issue.

The finding that "no official action has occurred", is erroneous on its face. The Commission adopted Resolution 98-69 , in part effectively "revoking" the Salvadors' existing DEC permit. The Commission sought and obtained a TRO for the Handicap access. It is unclear how it was determined that this means that the Salvadors suffered no "actual or threatened injury." *Brody* v. *Village of Port Chester*, 261 F.3d 288, 290 (2d Cir. 2001). If this does not meet the threshold test of standing, the Salvadors cannot see how a litigant can meet this bar.

The provisions of the ADA must be broadly construed. *Kornblau* v. *Dade County*, (C.A.11, 1996) 86 F.3d 193. Individual defendants properly are named under ADA anti-retaliatory provisions. *Ostrach* v. *Regents of the University of California*, (E.D.Cal. 1997) 957 F.Supp. 196. The individual named Respondents were properly named parties. Dismissal granted by the lower Courts was inappropriate. Issues of fact relating to retaliation under the ADA clearly prohibit such dismissal.

Bowers v. *Bethany Medical Center,* (D.Kan.1997) 959 F.Supp.1385; *Graz* v. *Abbott Laboratories,* (N.D.Ill. 1996) 940 F.Supp. 1227.

III. *ULTRA VIRES* ACTS OF STATE OFFICIALS AND CONTRACTORS ARE NOT PROTECTED BY SOVEREIGN OR QUALIFIED IMMUNITY, IN PARTICULAR WITH RESPECT TO VIOLATION OF THE ADA.

A. The Provisions of the ADA Applicable Here Specifically Provide that Eleventh Amendment Immunity is Not Available to States for Violation of the Act.

The ADA at 42 U.S.C. §12202 addresses the cloak of immunity asserted by the State, "A State ***shall not be immune under the eleventh amendment to the Constitution of the United States*** from an action in Federal or State court of competent jurisdiction for a violation of this Act." Assuming *arguendo* the decision is correct on the status of Respondents, including contractor Auffredou, as state actors, then § 12202 is properly applicable.

The ADA, 42 U.S.C.§§ 12101 *et seq.,* at § 2 sets fourth the purpose for the enactment of the Act:

> (a) (3) discrimination against individuals with disabilities persists in such critical areas as . . . public accommodations, . . .transportation, . . .***recreation,***. . .access to public services; . . . .
>
> (5) individuals with disabilities continually encounter various forms of discrimination, including ***outright intentional exclusion,*** the discrimination effects of architectural, transportation, and communication barriers, over protective rules and policies, ***failure to make modifications to existing facilities and practices,*** exclusionary qualification standards and criteria, ***segregation and relegation to lesser services,*** programs, activities, benefits, jobs, or other opportunities; . . . .[Emphasis added]

The ADA applies to public accommodations and commercial facilities. The term public accommodation is defined in 42 U.S.C. §§ 12101, *et seq.*, at § 12181(7)(A) to include "an inn, hotel, motel or other place of lodging, . . . " and 42 U.S.C. §§ 12101, *et seq.*, at § 12181(7)(I) to include "a park, zoo, amusement park, or other place of recreation;" and 42 U.S.C. §§ 12101, *et seq.*, at § 12181(7)(L) to include "a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation." As part of its role in implementation and enforcement of the provisions of the ADA, the DOJ adopted a Certification procedure under which state and local building codes may obtain Code Certification. In its publication, *Department of Justice, Certification of State and local Building Codes,* www.usdoj.gov/crt/ada/certcode.htm, the DOJ states specifics relating to both new construction and alterations to existing structures. As established in writing by Respondent White on behalf of the Commission, the Commission had no standards for construction of such Handicap facilities, only with respect to the limitation of use of such facilities. This document substantiates the Salvadors' allegations. Whether or not DOJ regulations and Technical Assistance Manual should be considered in determining whether or not a municipality's decisions when reviewed under the ADA previously was considered by the Second Circuit in *Innovative Health Systems, Inc.* v. *City of White Plains,* (2d Cir. 1997) 117 F.3d 37. The Court considered those factors in making its decision, and that the consideration reinforced the plain meaning of the ADA, did not contradicted its intent. Regulations promulgated under the ADA are entitled to the presumption of validity. *Ferguson* v. *City of Phoenix,* (D.Ariz. 1996) 931 F.Supp. 688; *Paralyzed Veterans of America* v. *D.C. Arena L.P.,* (C.A.D.C. 1997) 117 F.3d 579, 326 U.S.App.D.C. 25 . Those regulations are entitled to the equivalent of legislative weight, controlling weight when evaluated by the Courts. *Helen L.* v. *DiDario* ,(3rd Cir.1995) 46 F.3D 325, rehearing and rehearing in banc denied, cert. denied 116 S.Ct. 64, 133 L.Ed.2d 26; *Yeskey* v.

Commissioner of Pennsylvania Dept. of Corrections, (3rd Cir. 1997) 118 F.3d 168; *Does 1-5* v. *Chandler,* (9th Cir.1996) 83 F.3d 1150.

Respondents argued a position in direct contradiction to DOJ's publically enunciated position. In May 2000, in *A Guide to Disability Rights,* DOJ Civil Rights Division, Disability Rights Section, addresses requirements for compliance under Title III for Public Accommodations, stating, "Public accommodations are private entities who own, lease to, or operate facilities such as. . . hotels, . . .and recreation facilities, ..." *A Guide to Disability Rights,* p 6. When the Salvadors' facilities required repair work and area renovations, as part of their work plan they determined they needed to effectuate any "achievable barrier removal" to provide the requisite Handicap access to their recreational facilities. Access to water for recreational use enjoyment by guests and members, and their employees, required crossing an unimproved sandy area, creating a barrier to access for handicapped persons, especially using wheelchairs or crutches for mobility. The Salvadors sought and obtained all necessary and existing governmental approvals for the project. ADA is not limited to actual physical structures with definite physical boundaries, but includes areas of open air access encompassing precisely the Salvadors' Handicap Access. *Shultz By and Through Shultz* v. *Hemet Youth Pony League, Inc.* (C.D.Cal. 1996) 943 F. Supp. 1222.

The ADA applies to all aspects of state and local government function and governance, including Respondents' actions. *Saunders* v. *Horn,* (E.D.Pa. 1996) 959 F.Supp. 689. Respondents cannot evade ADA provisions by claiming lack of employer-employee relationship. Applicable ADA provisions do not required such relationship. *Judice* v. *Hospital Services District No. 1,* (E.D.La. 1996) 919 F. Supp. 978. Individuals are liable under the ADA for their own discriminatory acts. Respondents have the authority and discretion to make decisions which result in discriminatory treatment of those protected

under the ADA, including the Salvadors, leading to the inevitable conclusion that Respondents as individuals can be held personally liable for their own discriminatory acts. *Howe* v. *Hull,* (N.D.Ohio 1994) 874 F.Supp 779. As held in *Innovative Health Systems, Inc.* v. *City of White Plains,* (S.D.N.Y. 1996) 931 F.Supp.222, aff'd in part 117 F.3d 37 (2d Cir.1997), the question whether the proposed imposition of governmental regulations is a violation is a question of fact which cannot be resolved on a motion to dismiss. The provisions of the ADA are an inherent part of the Amended Complaint. The facial statutory language and judicial determination that Congress lawfully enacted the ADA pursuant to its authority under the Fourteenth Amendment, the ADA by its terms does not bar suits under the ADA against states in Federal Court. *Williams* v. *Ohio Department of Mental Health,* (S.D.Ohio 1997) 960 F.Supp. 1276; *Crawford* v. *Indiana Department of Corrections,* (N.D.Ind. 1996) 937 F.Supp. 785, reve'd 115 F.3d 481. Abrogation of states' Eleventh Amendment immunity under the ADA precludes assertion of that defense by state officials sued in their official capacity. *Duffy* v. *Riverhead,* (9th Cir. 1996) 98 F.3d 447. *Kilcullen* v. *New York State Department of Labor,* (2d Cir. 2000) 205 F.3d 77, held Congress validly abrogated the State's Eleventh Amendment immunity under the ADA through a valid exercise of its Fourteenth Amendment enforcement powers. *Muller* v. *Costello,* (2d Cir. 1999) 187 F.3d 77. As detailed above, this is in no way limited by the decision in *Garrett, supra.*

The Eleventh Amendment does not provide an absolute shield to defendants who act in violation of Constitutional rights. *Biggs* v. *Best, Best & Krieger,* (9th Cir. 1999) 189 F.3d 989. Respondents' conduct falls squarely within that intended and statutorily identified as constitutionally protected. *Gilbrook* v. *City of Westminster,* (9th Cir., May 21, 1999) 96-56306, 96-56375, 97-55314, 1999 WL 496486; *Anderson* v. *Creighton,* 486 U.S. 635 (1987). Eleventh Amendment immunity does not extend to protect conduct violating "'. . .clearly established statutory or

constitutional rights of which a reasonable person would have known.'" *Brewster* v. *Board of Education,* (9th Cir 1998) 149 F.3d 971, 977 quoting *Harlow* v. *Fitzgerald,* 457 U.S. 800, 818 (1982). Intentional acts of public officials knowingly violating Constitutional rights of others are not entitled to immunity. *Malley* v. *Briggs,* 475 U.S.335(1986).

The Eleventh Amendment "provides no immunity for state officials sued in their personal capacities." *Dube* v. *State University of New York,* 900 F.2d 587,595 (2d Cir. 1990); *Quartro* v. *Catterson,* 1996 WL 34120, *8, __ F.Supp. __ (1996). "[T]he Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law." *Brody* v. *Leamy,* 393 N.Y.S.2d 243,259 (N.Y.Sup. 1977) quoting *Scheuer* v. *Rhodes,* 416 U.S. 232,237, 94 S.Ct. 1683,1687 (1974). Such acts cannot be authorized in the performance of their official duties. *Pennhurst State School & Hospital* v. *Haldeman,* 465 U.S. 89,102, 104 S.Ct 900,909 (1984); *Berman Enters, Inc.* v. *Jording,* 3 F.3d. 602, 606 (2d Cir. 1993); *Rourke* v. *N.Y. State Dept. of Correct. Services,* 915 F.Supp. 525,539 (N.D.N.Y. 1995); *Farid* v. *Smith,* 850 F.2d 917,921 (2d Cir. 1988).

B. The Extension of Eleventh Amendment Immunity to Contractors Doing Business with the State or State Entities is Unauthorized and Unwarranted.

The extension by the Second Circuit of Eleventh Amendment immunity to contracting entities establishes a new precedent which far exceeds the prior scope of such immunity. Extension of this protection to non-governmental persons and entities merely because they hold a government contract is an open invitation to improper assertion of governmental "privileged" status. Not only are there no cases cited by the lower Court which actually support this position, the court did not provide any citation which the Salvadors can address in this argument.

The Salvadors sued under the provisions of the ADA. That statute allows injunctive relief and monetary recovery. 28 C.F.R. Part 36, §§ 501, *et seq.* and 505. The Salvadors sued individual Respondents in their official capacity for prospective injunctive relief to prevent the deprivation of Constitutional rights on the basis of violations of Federal Constitutionally protected rights. *Dube, supra,* at 595. The fact that the Salvadors also seek monetary damages is not barred by the Eleventh Amendment to the extent asserted against Respondents in their personal capacities.

IV. THE FIRST AMENDMENT PROTECTS INDIVIDUALS FROM INTERFERENCE WITH EXERCISE OF CITIZENS SEEKING REDRESS THROUGH COURT PROCEEDINGS.

A. The Right to Seek Relief Through Judicial Proceedings is an Inherent Part of Our System of Government and is Essential to Public Confidence in the System.

"[T]he rights to complain to public officials and to seek administrative and judicial relief [are] protected by the First Amendment." *Franco* v. *Kelly,* 854 F.2d 584, 589 (2d.Cir 1988); *Gagliardi* v. *Village of Pawling,* 18 F.3d 188,194 (2d.Cir.1994).

B. The Explicit Provisions of the ADA Precluding Gant of Immunity to the Commission and Auffrdou Establish the Disparate Treatment of the Salvadors on Issues of Handicap Access.

ADA Accessibility Standards in 28 C.F.R. Part 36, Appendix A are applicable since the Salvadors' facilities fell within the meaning of public accommodation under 42 U.S.C. § 12181(7)(A) and 28 C.F.R. § 36.104. The Commission's acts prohibiting completion and use of the Handicap Access is a defined violation of the ADA. The Commission directly interfered with the Salvadors' efforts to allow Handicap individuals' exercise and enjoyment of their protected rights. The conduct of the Commission restricts access and use of Lake George to existing property owners or those granted

access by the Commission.

The Commission and Auffredou, acted based on the Salvadors' prior exercise of their right to access to the Courts. The Commission argued that since the Salvadors were and are parties to other litigation, some involving the Commission, their application was properly treated differently. The Commission asserted the Salvador's prior access to the judicial system, in particular in *pro se* status, render any litigation brought by them frivolous and unentitled to any hearing.

C. The Salvadors' Marina Business is Engaged in Interstate Commerce Requiring Compliance with the ADA which the Commission Improperly Prevents.

The Salvadors' marina business is engaged in interstate commerce as established in the Record. 15 U.S.C. § 1, does not proscribe independent action on the grounds established in the Salvadors' pleadings. *Bogan* v. *Northwestern Mutual Life Insurance Company,* (S.D.N.Y. 1997) 953 F.Supp. 532. All elements required to support their allegations and detailed the Act specifically allowing action against governmental entities such as the Commission where their conduct violates these provisions. *Town of Hallie* v. *City of Eau Claire,*105 S.Ct.1713, 471 U.S. 34, 85 L.Ed.2d 24 (1985); *Airline Car Rental, Inc.* v. *Shreveport Airport Authority,* (W.D.La. 1986) 667 F.Supp. 293; *Jackson* v. *West Indian Co., Ltd.,* (D.Virgin Islands 1996) 944 F.Supp. 423. Under the 15 U.S.C. § 2, the Salvadors are proper parties to an action to prohibit monopolizing trade. *United States* v. *Aluminum Co. of America,* (2d Cir. 1945) 148 F.2d 416. Business interests are either held directly or indirectly by Respondents, but the full extent cannot be determined without discovery. The statute ***requires*** discovery to obtain documents exclusively in Commission and Individual Respondents' possession relating to competing business interests held by one or more individuals named who acted in decision making capacity and interfered with the Salvadors' business in interstate commerce.

Northern Securities Co. v. *U.S.*,24 S.Ct.436,193 U.S.197(1904). See also *Atlantic Motel* v. *United States*, 379 U.S. 241; *Katzenbach* v. *McClung*, 379 U.S. 294,; *Maryland* v. *Wirtz*, 392 U.S. 183, 193.

The Commission created a sub-class of land owner-marina operator, including only the Salvadors, who the Commission, by virtue of its unfettered regulatory powers, denied the ability to engage in commercial ventures involved in interstate commerce and at the same time prevent from meeting the requirements of the ADA. The Commission allowed other similarly situated land owner-marina operators to develop commercial (and interstate) uses of their property. The methodology and application of these regulatory powers by the Commission as wielded against the Salvadors, as opposed to other land owners-marina operators in the same area, including those who have made no attempt to comply with the ADA, results in unconstitutional interference with and imposition of impermissible burden on interstate commerce and a clear denial of equal protection through its discriminatory regulation application.

CONCLUSION

THEREFORE, Petitioners John Salvador, Jr. and Kathleen A. Salvador request this Court that it **GRANT** the Petition for a Writ of Certiorari to the United Sates Court of Appeals for the Second Circuit.

Respectfully submitted,

MADELINE SHEILA GALVIN
Counsel of Record
c/o GALVIN AND MORGAN
217 Delaware Avenue
Delmar, NY 12054
(518) 439-7734

(2)

SUPREME COURT U.S.
FILED

02 350 SEP - 3 2002

No. CLERK OF THE COURT

IN THE

Supreme Court of the United States

JOHN SALVADOR, JR. and KATHLEEN A. SALVADOR,

Petitioners,

v.

ADIRONDACK PARK AGENCY OF THE STATE OF NEW YORK, THE LAKE GEORGE PARK COMMISSION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX - VOLUME I

MADELINE SHEILA GALVIN
Counsel of Record
c/o Galvin and Morgan
217 Delaware Avenue
Delmar, New York 12054
(518) 439-7734
Attorneys for Petitioners

138 pp

TABLE OF CONTENTS

CIRCUIT COURT OPINION 2a

ORDER DENYING REHEARING 15a

RELEVANT PROVISIONS INVOLVED 16a

VOLUME I:

UNITED STATES CONSTITUTION, ARTICLE III 16a

UNITED STATES CONSTITUTIONAL AMENDMENTS 17a

UNITED STATES CODE 21a

STATE ADMINISTRATIVE PROCEDURE ACT 32a

CODE OF FEDERAL REGULATIONS 51a

ADA ACCESSIBILITY GUIDELINES FOR BUILDINGS AND FACILITIES 102a

VOLUME II:

ADA ACCESSIBILITY GUIDELINES FOR BUILDINGS AND FACILITIES, cont 139a

CERTIFICATION OF STATE AND LOCAL BUILDING CODES 266a

DISTRICT COURT DECISION 270a

APPENDIX

CIRCUIT COURT OPINION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR THE PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals or the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th day or April, two thousand and two.

PRESENT:

HON. THOMAS J. MESKILL
HON. ROBERT D. SACK
HON. MYRON H. BRIGHT,*

United States Court of Appeals, Second Circuit
Filed: April 26, 2002.
Roseann B. Mackechnie, Clerk.

---

* The Honorable Myron H. Bright, Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Circuit Judges.

JOHN SALVADOR, JR. & KATHLEEN A. SALVADOR,

Plaintiffs-Appellants,

v. No. 01-7539

ADIRONDACK PARK AGENCY OF THE STATE OF NEW YORK, et al.,

Defendants-Appellees.

For Plaintiffs-Appellants:
MADELINE SHEILA GALVIN, Delmar, NY.

For all Defendants-Appellees except Martin Auffredou:
LAWRENCE A. RAPPOPORT (Peter H. Schiff and Lisa M. Burianek, of counsel), for Eliot Spitzer, Attorney General of the State of New York, Albany, NY>

For Defendant-Appellee Martin Auffredou:
RICHARD J. BARTLETT, Glen [sic.] Falls, NY.

Appeal from the United States District Court for the Northern District of New York (Frederick J. Scullin, Jr., Chief Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of March 28, 2001 be, and it hereby is, AFFIRMED.

John and Kathleen Salvador appeal a March 28, 2001 memorandum decision and order granting the defendants'

motion for judgment on the pleadings under Fed. R. Civ. P. 12(c). The Salvadors, residents of Queensbury in Warren County, New York, have operated a commercial marina on Lake George since the 1970s. The instant dispute concerns the Salvadors' attempt to obtain a permit for their marina, and their construction of what they assert would be and handicap and emergency access ramp. Alleging violations of several constitutional and statutory provisions, *inter alia* the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"), the plaintiffs filed suit under 42 U.S.C. § 1983 against numerous defendants. The plaintiffs' amended complaint enumerates fourteen claims. We affirm the district court's dismissal because none of the Salvadors' claims have merit and, additionally, all the state defendants are entitled to sovereign immunity under the Eleventh Amendment.[*1]

I. Standing

As a threshold matter, a plaintiff, in order to have

---

1. We note that plaintiffs do not address the behavior of the Adirondack Park Agency of the State of New York, the New York State Department of Transportation, the Town of Queensbury, the Lake George Association, Inc., the Department of the Army Corps of Engineers, the Lake George Park Trust Fund, or Carl H. McCall in their briefs. All claims against the foregoing are therefore also dismissed. Reg'l Econ. Cmty. Action Program V. City of Middletown, 281 F.3d 333, 343 n. 1 (2d Cir 2002).

standing to bring suit, must suffer "actual or threatened injury." Brody v. Vill. of Port Chester, 261 F.3d 288, 290 (2d Cir 2001). The defendants contend that plaintiffs cannot meet this requirement because no official action has occurred. Reading the complaint in the light most favorable to the plaintiffs, there may be a constitutionally cognizable injury in the alleged deprivation of their 1982 permit for a marina.

II. Sovereign Immunity

"While the [Eleventh] Amendment by its terms does not bar suits against a State by its own citizens, [the Surpreme] Court has consistently held that an unconsenting State is immune from suit brought in federal courts by her own citizens as well as by citizens of another State." Edelman v. Jordan, 415 U.S. 651, 662-63 (1974). The Eleventh Amendment's bar does not merely prohibit suits that contain a state in the caption; rather, "the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceedings." Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945). "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to involve its sovereign immunity from suit even though individual officials are nominal defendants." Id. An award of damages here would forestall enforcement of New York's environmental management rules by the Lake George Park Commission ("the Commission"). For this reason alone, the suit against the institutional and the individual defendants in their official capacities fail.

All the institutional defendants and the individual defendants acting in their official capacities have sovereign

immunity under our traditional analysis.[2] We have elaborated a six-part test for determining whether a state is entitled to Eleventh Amendment sovereign immunity: "(1) how the entity is referred to in its documents of origin; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) Whether the entity's function is traditionally one of state or local government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's financial obligations are binding upon the state." McGinty v. New York, 251 F.3d 84, 95-96 (2d Cir. 2001).

As a threshold matter, New York's Department of Environmental Conservation has been determined to be a state entity. Baker v. Dep't of Envtl. Conservation, 634 F. Supp. 1460, 1462-63 (N.D.N.Y. 1986). Moreover, the plaintiffs' argument that the Commission is not an arm of the state, which is contained in their reply brief, would ordinarily be considered untimely. Tischmann v. ITT/Sheraton Corp., 145 F.3d 561, 568 n. 4 (2d Cir. 1998). We need not decide if an Eleventh Amendment argument can be wived, however, because the plaintiffs' argument lacks merit. Because "[m]oneys appropriated for the use of the commission by the state [are] paid out of the state treasury," N.Y. Envtl. Conserv. § 43-0109, a judgment against the Commission is "in essence one for

---

[2] The plaintiffs argue that defendant Auffredou does not benefit from sovereign immunity because he is an independent contractor. This argument, raised only in the reply brief (and then only obliquely), is not properly present and we decline to address it. See Tischmann v. ITT/Sheraton Corp., 145 F.3d 561, 568 n. 4 (2d Cir. 1998). We note that because none of the Salvadors' substantive allegations withstand analysis, their claims would fail regardless of the availability of sovereign immunity.

recovery of money from the state." Ford Motor Co., 323 U.S. at 464. The remainder of the McGinty factors also counsel in favor of sovereign immunity.

Finally, "suit[s] against state officials that [are] in fact . . . Suit[s] against a State [are] barred [under the Eleventh Amendment] regardless of whether [they] seel [ ] damages or injunctive relief." Pennhurst State Sch & Hopsp. v. Halderman, 465 U.S. 89, 102 (1984). All of the claims against the individual defendants and the individual defendants in their official capacities are entitled to it.

In sum, there is no reason to disturb the district court's findings on sovereign immunity because all of the institutional defendants and the individual defendants in their official capacities are entitled to it.

III. Qualified Immunity

We turn now to the claims against the individual defendants in their individual capacities. "A government actor performing a discretionary task is entitled to [qualified] immunity from§ 1983 suits if either (a) the defendant's action didn not violate clearly established law, or (b) It was objectively reasonable for the defendant to believe that his action did not violate such law." Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 250 (2d Cir. 2001) (internal citations and quotation marks omitted). We first determine whether the plaintiff has alleged an actual deprivation of a constitutional right. See Wilson v. Layne, 526 U.S. 603, 609 (1999).

We note initially that courts cannot accept "'legal conclusions,' 'unsupported conclusions,' 'footless conclusions of law,' or 'sweeping legal conclusions cast in the form of factual allegations.'" 5A Charles Alan Wright et al., Federal

Practice and Procedure§ 1357 (2d ed. 1990). Second, we note that the extraordinary prolixity of plaintiffs' complaint,[3] which requires us to engage in substantial interpolation in an attempt to understand just what rights of the plaintiffs they assert have been violated. Reviewing each perceived claim in turn, we conclude that none of plaintiffs' claims have merit. On this ground, we affirm the district court's disposition of the case.

a. Equal Protection

First, the plaintiffs contend that in managing the marina permit application process, the Commission applied different rules to them in comparison with other similarly situated applicants. Without presence of a suspect class or fundamental right, "[t]he general rule is that legislation is presumed to be valid [under equal protection analysis] and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985). For the plaintiffs to allege successfully an equal protection violation in their regulatory treatment, they must plead facts that, if proven, would establish that they "'compared with others similarly situated, w[ere] selectively treated." Zahra v. Town of Southold, 48 F.3d 674, 683 (2d Cir. 1995) (quoting FSK Drug Corp. v. Perales, 960 F.2d 6, 10 (2d Cir. 1992)).

The plaintiffs fail to allege that similarly situated applicants were treated differently than they were i n anything

---

[3] The amended complaint covers 123 pages and contains 754 numbered paragraphs of allegations. Cf. Fed. T. Civ. P. 8(a) ("A pleading which sets forth a claim for relief . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . . ") (emphasis added).

other than conclusory statements. Rather, the plaintiffs assert that they behave differently from other applicants, and were as a consequence treated differently. The plaintiffs do not contest that they submitted, and then withdrew, an application for a Class A marina permit. Although they allege that their application received discussion and attention unlike any other, the do not allege that any other applicant withdrew a pending application. Rather, the amended complaint alleges only that another application was accepted, even though it was incomplete, and in violation of Queensbury town ordinances. But the Salvadors' application was not rejected for incompleteness or for violation of town ordinances. Hence, even were these assertions to be proven true, the plainiffs would not have identified a similarly situated applicant. The plaintiffs' remaining allegations relating to the equal protection claim are equally conclusory and therefore must all be rejected.

b. Procedural Due Process

To succeed on a procedural due process claim, a plaintiff "must first establish a valid property interest within the meaning of the Constitution," and second "demonstrate that the defendant acted in an arbitrary or irrational manner in depriving him [or her] of that property interest. Crowley v. Courville, 76 F.3d 47, 52 (2d Cir. 1996). For two reasons, the plainiffs have not established a property interest. First, despite counsel's contrary assertion at oral argument, the permit on its face expired on December 31, 1989.

Second, the plaintiffs have conceded that they had only a permit. As a matter of New York law, a permit creates no property right. In New York State Trawlers Association v. Jorling, 16 F.3d 1303, 1306 (2d Cir. 1994) ("Trawlers Association"), this Court addressed the abrogation of a permit system for lobster fishing in New York. Trawlers Association

described the permit system as a "licensing scheme [ ]" and went on to discuss the permits as "licenses." Id. at 1311. Licenses can be altered or eliminated "so long as the alteration (or elimination) is rationally related to a legitimate state interest." Id. Here, there is nothing to suggest that the change in permit regulation effected by the Commission is anything but rational. Even if the permit had not on its face expired, the state could abrogate it without violating the Salvadors' due process rights.

c. Ex Post Facto Regulation

A two-part test is used to determine whether a law triggers ex post facto concerns. First, whether the legislature intended the statute to be criminal or civil; and second, if the intent was nonpunitive, whether the statute is so punitive in fact that it cannot be legitimately seen as civil in nature. Doe v. Pataki, 120 F.3d 1263, 1272-74 (2d Cir. 1997). The plaintiffs do not (and could not reasonably allege that marina regulations are "so punitive in purpose or effect" as to trigger ex post facto concern. Id. at 1274 (internal citations and quotation marks omitted).

d. Retaliation for First Amendment Activity

A retaliation claim under the First Amendment requires a showing "(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action." Garcia v. S.U.N.Y. Helath Sci Ctr. of Brooklyn, 280 F.ed 98, 106-107 (2d C (internal citation and quotation marks omitted). Dismissal of a retaliation claim on the pleadings is not warranted "'unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Dangler v. N.Y. City Off-Track Betting Corp., 193

F.3d 130, 138 (2d Cir. 1999) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

The plaintiffs' complaint, however, does not allege any of the three elements of a retaliation action. First, the plaintiffs do not state what protected activity they undertook. Although they allege "challeng[ed] actions taken against them by [state officials] in several legal forums including but not limited to New York State Supreme Court and [the Commission], "We reject as untimely plaintiffs' counsel's suggestion in oral argument that the instant federal court action was the basis for the retaliation.

Second, the plaintiffs fail to specify what retaliatory act was taken against them. Although some of the defendants' actions alleged in the complaint may constitute retaliation in some circumstances, the plaintiffs fail to give notice that their claims rest on such acts. Thus, the plaintiffs allegations of retaliation are too insubstantial to survive even a Rule 12 (c) motion. Finally, the plaintiffs complaint contains no sufficient allegation of a causal connection.

e. Defamation

The plaintiffs allege being "slandered, defamed and attacked in litigation" by the defendants. Clause comprises:

> (1) the utterance of a statement about him or her that is sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false, and (2) some tangible and material state-imposed burden or alteration of his or her status or of a right in addition to the stigmatizing statement.

Doe v. Dep't of Pub. Safety, 271 F.3d 38, 47 (2d Cir. 2001). For two reasons, the defamation claims founder. First, accepting

arguendo that an allegation of regulatory violations constitutes an injury to reputation, the plaintiff has not alleged any tangible and material state-imposed burden to satisfy the second part of the test. Second, "no due process violation occur[s] when the plaintiff is] offered the opportunity for a 'name-clearing hearing.'" Komlosi v. N.Y. State Office of Mental Retardation & Developmental Disabilities, 64 F.3d 810, 817 (2d Cir. 1995) (citation omitted). In the instant case, the ongoing state court proceedings constitute this opportunity. In the instant case, the ongoing state court proceedings constitute this opportunity.

f. ADA Violations

The plaintiffs contend that they alleged a claim under the ADA in their amended complaint. The district court "note[d] that Plaintiffs' Thirteenth Cause of Action, while rather lengthy, fails to allege any cause of action clearly." Chief Judge Scullin further questioned whether the claim "is sufficiently pled to meet even the lenient [pleading] requirements of [Fed. R. Civ. P. 8]."

The district court correctly concluded that the plaintiffs failed to state a claim under the ADA. The plaintiffs' complaint makes only fleeting reference to the ADA. It states that theri attempts to construct a "Handicap and Emergency Access facility" followed their attempt "to comply with the Americans with Disabilities Act." They do not however allege that the defendants acted against them because of their handicap or a handicap that one of either their guests, customers, or employees have. Their complaint simply fails to allege discrimination. Indeed while the plaintiffs "[i]n the past . . . have had both employees and guests with physical handicaps," nowhere in the complaint is it alleged that the plaintiffs either currently employ or otherwise deal with handicapped persons. In short, nothing in the complaint gives

the defendants "fair notice of the basis for petitioner's [ADA] claim [ ]." Swierkiewicz v. Sorema N.A., - U.S. -, 122 S. Ct. 992, 999 (2002).

g. The Dormant Commerce Clause

The Salvadors allege that the defendants' selective enforcement of zoning ordinances violated the dormant Commerce Clause by burdening interstate commerce. In a dormant Commerce Clause analysis, "a court must determine whether a state or local government is regulating and, if so, whether that regulation affects interstate commerce. . . . [I]t must next determine whether the regulation discriminates against interstate commerce or regulates even-handedly with incidental effects on interstate commerce." United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgt. Auth., 261 F.3d 245, 254-44 (2d Cir. 2001) (internal quotation marks and citations omitted). Absent discrimination , a law "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Id. at 256 (internal quotation marks and citations omitted). Because the plaintiffs allege nothing that could constitute interstate discrimination or protectionism, their Commerce Clause claim lacks merit.

h. The Antitrust Claim

Finally, the plaintiffs make no mention of an antitrust action in their complaint, and so waived it. "Having failed to make the present argument to the district court, plaintiff[s] will not be heard to advance it here." Gurary v. Winehouse, 190 F.3d 37, 44 (2d Cir. 1999).

i. Conclusions

None of the plaintiffs' claims survive even the mildest

scrutiny. For this reason, we dismiss them without proceeding further in the qualified immunity analysis.

For the foregoing reasons, the judgment of the District is hereby AFFIRMED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

/s/ Lucielle Carr 4/26/02
By: Date

ORDER DENYING REHEARING

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York on the 3rd day of June two thousand two.

United States Court of Appeals, Second Circuit; Filed June 3, 2002. Roseann B. Mackechnie, Clerk. Dkt No. 01-7539

Salvador, et al.,
Plaintiffs-Appellants

v.

Lake George Park, et al.,
Defendants-Appellees

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants Salvador, et al.

Upon consideration by the panel that decided the appeal, it is
Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: /s/Arthur M. Heller
Arthur M. Heller,
Administrative Attorney

RELEVANT PROVISIONS INVOLVED

UNITED STATES CONSTITUTION AND AMENDMENTS

Article III

Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state ;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with

such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Section 3. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers,

counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age , and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all

such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CODE

42 USC Sec. *1983*

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 21 - CIVIL RIGHTS
SUBCHAPTER I - GENERALLY

Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 USC Sec. *1988*

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 21 - CIVIL RIGHTS
SUBCHAPTER I - GENERALLY

Sec. 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United

States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. 1681 et seq.), the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.), the Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C. 2000cc et seq.), title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

42 USC Sec. *12101*

TITLE 42 - THE PUBLIC HEALTH AND WELFARE

CHAPTER 126 - EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

Sec. 12101. Findings and purpose

-STATUTE-

(a) Findings

The Congress finds that -

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards

and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter -

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards

addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 USC Sec. *12202*

TITLE 42 - THE PUBLIC HEALTH AND WELFARE

CHAPTER 126 - EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

SUBCHAPTER IV - MISCELLANEOUS PROVISIONS

Sec. 12202. State immunity

-STATUTE-

- A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in (FOOTNOTE 1) Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

(FOOTNOTE 1) So in original. Probably should be "in a".

42 USC Sec. *12203*

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 126 - EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES
SUBCHAPTER IV - MISCELLANEOUS PROVISIONS

Sec. 12203. Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively.

42 USC Sec. *12181*

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 126 - EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES
SUBCHAPTER III - PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY
PRIVATE ENTITIES

Sec. 12181. Definitions

As used in this subchapter:

(1) Commerce

The term "commerce" means travel, trade, traffic, commerce, transportation, or communication -

(A) among the several States;

(B) between any foreign country or any territory or possession and any State; or

(C) between points in the same State but through another State or foreign country.

(2) Commercial facilities

The term "commercial facilities" means facilities -

(A) that are intended for nonresidential use; and

(B) whose operations will affect commerce.

Such term shall not include railroad locomotives, railroad freight cars, railroad cabooses, railroad cars described in section 12162 of this title or covered under this subchapter, railroad rights-of-way, or facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968 (FOOTNOTE 1) (42 U.S.C. 3601 et seq.).

(FOOTNOTE 1) See References in Text note below.

(3) Demand responsive system

The term "demand responsive system" means any system of providing transportation of individuals by a vehicle, other than

a system which is a fixed route system.

(4) Fixed route system

The term "fixed route system" means a system of providing transportation of individuals (other than by aircraft) on which a vehicle is operated along a prescribed route according to a fixed schedule.

(5) Over-the-road bus

The term "over-the-road bus" means a bus characterized by an elevated passenger deck located over a baggage compartment.

(6) Private entity

The term "private entity" means any entity other than a public entity (as defined in section 12131(1) of this title).

(7) Public accommodation

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce -

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance

office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

(8) Rail and railroad

The terms "rail" and "railroad" have the meaning given the term "railroad" in section 20102(1) of title 49.

(9) Readily achievable

The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include -

(A) the nature and cost of the action needed under this chapter;

(B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with

respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

(10) Specified public transportation

The term "specified public transportation" means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(11) Vehicle

The term "vehicle" does not include a rail passenger car, railroad locomotive, railroad freight car, railroad caboose, or a railroad car described in section 12162 of this title or covered under this subchapter.

STATE STATUTES

State Administrative Procedure Act

§§ 100. Legislative intent

The legislature hereby finds and declares that the administrative rulemaking, adjudicatory and licensing processes among the agencies of state government are inconsistent, lack uniformity and create misunderstanding by the public. In order to provide the people with simple, uniform administrative procedures, an administrative procedure act is hereby enacted. This act guarantees that the actions of administrative agencies conform with sound standards developed in this state and nation since their founding through constitutional, statutory and case law. It insures that equitable practices will be provided to meet the public interest.

It is further found that in the public interest it is desirable for state agencies to meet the requirements imposed by the administrative procedure act. Those agencies which will not have to conform to this act have been exempted from the act, either specifically by name or impliedly by definition.

§§ 101. Short title

This chapter shall be known and may be cited as the "State Administrative Procedure Act."

§§ 102. Definitions

As used in this chapter,

1. "Agency" means any department, board, bureau, commission, division, office, council, committee or officer of

the state, or a public benefit corporation or public authority at least one of whose members is appointed by the governor, authorized by law to make rules or to make final decisions in adjudicatory proceedings but shall not include the governor, agencies in the legislative and judicial branches, agencies created by interstate compact or international agreement, the division of military and naval affairs to the extent it exercises its responsibility for military and naval affairs, the division of state police, the identification and intelligence unit of the division of criminal justice services, the state insurance fund, the unemployment insurance appeal board, and except for purposes of subdivision one of section two hundred two-d of this chapter, the workers' compensation board and except for purposes of article two of this chapter, the state division of parole and the department of correctional services.

2. (a) "Rule" means (i) the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof and (ii) the amendment, suspension, repeal, approval, or prescription for the future of rates, wages, security authorizations, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs or accounting, or practices bearing on any of the foregoing whether of general or particular applicability.

3. "Adjudicatory proceeding" means any activity which is not a rule making proceeding or an employee disciplinary action before an agency, except an administrative tribunal created by statute to hear or determine allegations of traffic infractions which may also be heard in a court of appropriate jurisdiction, in which a determination of the legal rights,

duties or privileges of named parties thereto is required by law to be made only on a record and after an opportunity for a hearing.

4. "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law.

5. "Licensing" includes any agency activity respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, recall, cancellation or amendment of a license.

6. "Person" means any individual, partnership, corporation, association, or public or private organization of any character other than an agency engaged in the particular rule making, declaratory ruling, or adjudication.

7. "Party" means any person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

8. "Small business" means any business which is resident in this state, independently owned and operated, and employs one hundred or less individuals.

9. "Substantial revision" means any addition, deletion or other change in the text of a rule proposed for adoption, which materially alters its purpose, meaning or effect, but shall not include any change which merely defines or clarifies such text and does not materially alter its purpose, meaning or effect. To determine if the revised text of a proposed rule contains a substantial revision, the revised text shall be compared to the text of the rule for which a notice of proposed rule making was published in the state register;

provided, however, if a notice of revised rule making was previously published in the state register, the revised text shall be compared to the revised text for which the most recent notice of revised rule making was published.

13. "Data" means written information or material, including, but not limited to statistics or measurements used as the basis for reasoning, calculations or conclusions in a study.

§§ 202. Rule making procedure

1. Notice of proposed rulemaking. (a) Prior to the adoption of a rule, an agency shall submit a notice of proposed rule making to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule. Unless a different time is specified by statute, the notice of proposed rule making must appear in the state register at least forty-five days prior to either
(i) the addition, amendment or repeal of a rule for which statute does not require that a public hearing be held prior to adoption, or
(ii) the first public hearing on a proposed rule for which such hearing is so required.
The notice of proposed rule making shall indicate the last date for submission of comments on the proposed rule, which, unless a different time is specified in statute, shall be not less than forty-five days after the date of publication of such notice, or, if statute requires that a public hearing be held prior to adoption, not less than five days after the date of the last public hearing scheduled to be held on the proposed rule.
(b) (i) When an agency submits a notice of proposed rule making as provided in paragraph (a) of this subdivision solely for the purpose of proposing a consensus rule for adoption, the agency may dispense with any requirement for public

hearing and the requirements of subparagraphs (ii), (iii), (iv), (vi) and (vii) of paragraph (f) of this subdivision; provided, however, that such notice shall include a statement setting forth a clear and concise explanation of the basis for the agency's determination that no person is likely to object to the adoption of the rule as written.

(ii) If any public comment is received on the rule which contains any objection to adoption of a consensus rule, the agency must withdraw the notice of proposed rule making for the consensus rule and may submit a notice of proposed rule making for such rule making which complies with all of the relevant provisions of this subdivision.

(iii) Unless otherwise provided by law, a rule defined in subparagraph (ii) of paragraph (a) of subdivision two of section one hundred two of this chapter may be adopted as a consensus rule in accordance with the provisions of this paragraph; provided, however, that for the purposes of paragraph (c) of subdivision one of section one hundred three of this chapter, any public hearing required by law to be held on any such rule shall be deemed to be explicitly directed at such rule. No such rule which is defined by the public service law as a "major change" may be adopted as a consensus rule.

(c) When appropriate in the judgment of the agency, a notice may also be published in newspapers of general circulation and in trade, industry or professional publications as the agency may select.

(d) The requirement for publication of a notice of proposed rule making in the state register shall not preclude the initiation of a public hearing with respect to the proposal of any rule defined in subparagraph (ii) of paragraph (a) of subdivision two of section one hundred two of this chapter where notice otherwise consistent with the provisions of this subdivision has been given, provided, however, in all situations notice must be published within a reasonable time

prior to the hearing.
(e) When an agency submits a notice of proposed rule making for a rule which was proposed for adoption as a consensus rule and subsequently withdrawn pursuant to paragraph (b) of this subdivision, such notice shall identify the prior notice of proposed rule making and shall briefly describe the objection or objections which caused the prior notice of proposed rule making to be withdrawn.
(f) The notice of proposed rule making shall:
(i) cite the statutory authority, including particular sections and subdivisions, under which the rule is proposed for adoption;
(ii) give the date, time and place of any public hearing or hearings which are scheduled;
(iii) state whether or not the place of any public hearing or hearings shall be reasonably accessible to persons with a mobility impairment; for purposes hereof, "persons with a mobility impairment" shall mean those persons with a physical impairment which is permanent and severely limits that person's mobility, or a person who is unable to ambulate without the aid of a wheelchair or other prosthetic device; provided, however, that the failure of such accessibility in accordance herewith, upon diligent effort to have provided same, shall have no effect upon any actions or proceedings taken at any such subject hearings;
(iv) include a statement that interpreter services shall be made available to deaf persons, at no charge, upon written request to such agency representative as shall be designated pursuant to subparagraph (viii) of this paragraph within a reasonable time prior to any scheduled public hearing or hearings. If interpreter services are requested, the agency conducting the rule making proceeding in all instances shall appoint a qualified interpreter who is certified by a recognized national or New York state credentialing authority to interpret the proceedings to, and the testimony of, such deaf person. Such

agency shall determine a reasonable fee for all such interpreting services which shall be a charge upon the agency;
(v) contain the complete text of the proposed rule, provided, however, if such text exceeds two thousand words, the notice shall contain only a description of the subject, purpose and substance of such rule in less than two thousand words;
(vi) include a regulatory impact statement prepared pursuant to section two hundred two-a of this chapter, provided, however, if such statement exceeds two thousand words, the notice shall include only a summary of such statement in less than two thousand words;
(vii) include a regulatory flexibility analysis and a rural area flexibility analysis prepared pursuant to sections two hundred two-b and two hundred two-bb of this chapter, provided, however, if an analysis exceeds two thousand words, the notice shall include only a summary of such analysis in less than two thousand words;
(viii) give the name, public office address and telephone number of an agency representative, who is knowledgeable on the proposed rule, from whom the complete text of such rule and any scientific or statistical study, report and analysis that served as the basis for the rule and any supporting data, the regulatory impact statement, the regulatory flexibility analysis, and the rural area flexibility analysis may be obtained; from whom information about any public hearing may be obtained; and to whom written data, views and arguments may be submitted; and
(ix) include any additional matter required by statute.

5. Notice of adoption.
(a) When an agency files a rule with the secretary of state, such agency shall also submit a notice of adoption to the secretary of state for publication in the state register. Except

as provided in subdivision six of this section, an agency may not file a rule with, or submit a notice of adoption to, the secretary of state unless the agency has previously submitted a notice of proposed rule making and complied with the provisions of this section.

(c) The notice of adoption shall:
(i) cite the statutory authority, including particular sections and subdivisions, under which the rule is adopted;
(ii) contain the complete text of the rule as adopted, provided, however, if such text exceeds two thousand words, the notice shall contain only a description of the subject, purpose and substance of such rule in less than two thousand words;
(iii) state whether there have been any changes in the text of the rule as adopted when compared with the text of the latest published version of the proposed rule, and if such changes have occurred, cite the particular sections, subdivisions and paragraphs so changed;
(iv) give the effective date of the rule;
(v) include a revised regulatory impact statement, when required by the provisions of subparagraph (ii) of paragraph (a) of subdivision six of section two hundred two-a [FN1] of this chapter, provided, however, if such statement exceeds two thousand words, the notice shall include only a summary of such statement in less than two thousand words;
(vi) include a revised regulatory flexibility analysis and rural area flexibility analysis, when required by the provisions of subparagraph (ii) of paragraph (a) of subdivision seven of section two hundred two-b [FN2] and paragraph (b) of subdivision eight of section two hundred two-bb of this chapter, provided, however, if such statement exceeds two thousand words, the notice shall include only a summary of such statement in less than two thousand words;
(vii) include the assessment of public comment, prepared pursuant to paragraph (b) of this subdivision, provided,

however, if such assessment exceeds two thousand words, the notice shall include only a summary of such assessment in less than two thousand words;
(viii) give the name, public office address and telephone number of an agency representative from whom the complete text of the rule and any revised regulatory impact statement, revised regulatory flexibility analysis, rural area flexibility analysis or assessment of comments may be obtained; and
(ix) state whether any notice of revised rule making had been submitted for such rule making and specify the date or dates that such notice or notices appeared in the state register; and
(x) include any additional matter required by statute.

6-a. Distribution of rulemaking information.
(a) An agency shall transmit a copy of any rule making notice prepared pursuant to this article to the governor, the temporary president of the senate, the speaker of the assembly, the administrative regulations review commission and the office of regulatory and management assistance at the time such notice is submitted to the secretary of state for publication in the state register. Such transmittal shall include the complete rule text, regulatory impact statement, regulatory flexibility analysis, rural area flexibility analysis, or revisions thereof, and any other information submitted to the secretary of state pursuant to this article.
(b) An agency shall make a copy of the complete text of any proposed, adopted or emergency rule, regulatory impact statement, regulatory flexibility analysis, rural area flexibility analysis, or revisions thereof available to the public at the time such documents are submitted to the secretary of state for publication in the state register and shall send to any person a copy of such text upon written request.
(c) An agency shall notify every person who has submitted a

written request to be notified of all proposed, revised, emergency and/or adopted rules which may affect such person. Such requests shall expire annually on the thirty-first day of December with renewals for the succeeding year to be accepted on or after December first. Notices issued pursuant to such requests shall be sent in writing to the last address specified by the person. An agency may charge any person requesting such notice a fee consisting of the cost of preparation, handling and postage.

7. Rule text requirements.

(a) Except with respect to any rule defined in subparagraph (ii) of paragraph (a) of subdivision two of section one hundred two of this chapter, the complete text of any proposed or adopted rule shall identify new language by underscoring or italics, enclose in brackets any words which are to be deleted, and give the citation of any rule which is to be repealed.

(b) Notwithstanding any provision herein to the contrary, an agency may:

(i) with regard to a notice published in the state register concerning a rule defined in subparagraph (ii) of paragraph (a) of subdivision two of section one hundred two of this chapter, elect to include either the complete text of the proposed or adopted rule in two thousand words or less, or a description of the subject, purpose and substance of such rule in less than two thousand words; and

(ii) with regard to a notice published in any newspaper or publication other than the state register, elect to include either the complete text or a description of the subject, purpose and substance of the proposed or adopted rule.

(c) For the purposes of determining if the length of the text of a rule to be published pursuant to this section exceeds two thousand words, such text shall exclude any previously

published portion of the rule which is precisely identified in the text thereof pursuant to paragraph c of subdivision one of section one hundred two of the executive law;

8. Judicial review.
A proceeding may be commenced to contest a rule on the grounds of noncompliance with the procedural requirements of this section, section two hundred two-a and section two hundred two-b of this chapter, provided, however, such proceeding must be commenced within four months from the effective date of such rule. Each rule shall be promulgated in substantial compliance with the provisions of such sections, provided, however, the inadvertent failure to send notice to any person shall not serve to invalidate any rule promulgated hereunder.

9. Secretary of state.
The secretary of state shall:
(i) prescribe standard forms to be used by agencies when submitting for publication in the state register the notices required by this section;
(ii) promptly review each notice submitted by an agency for such publication;
(iii) reject those notices which are not in substantial compliance with the provisions of this section, give prompt notice of such rejection to the agency, and advise such agency on the corrective action required; and
(iv) publish all notices and statements, required by this section and section two hundred one-a of this chapter, in the state register as soon as practicable.

[FN1] So in original. Now State Administrative Procedure Act ' 202-a, subd. 6, par. (ii).
[FN2] So in original. Now State Administrative Procedure Act ' 202-b, subd. 7, par. (ii).

[FN3] So in original. Comma inadvertently omitted.

§§ 203. Filing; effective date

1. Except as provided in subdivision two of this section, no rule shall become effective until it is filed with the secretary of state and the notice of adoption is published in the state register pursuant to subdivision five of section two hundred two of this article, unless: (i) a later date is required by statute or is specified in the rule, (ii) adopted as an emergency rule pursuant to subdivision six of section two hundred two of this article, or (iii) defined as a rule in subparagraph (ii) of paragraph (a) of subdivision two of section one hundred two of this chapter. Each rule submitted for filing shall have attached thereto the certificate required under subdivision two of section one hundred two of the executive law.

2. (a) An agency may, after a rule is filed with the secretary of state pursuant to subdivision one of this section and prior to the effective date of such rule, amend, suspend or repeal such rule prior to the effective date without complying with the provisions of subdivision one of section two hundred two of this article. If an agency amends, suspends or repeals a rule pursuant to this subdivision, such agency shall file a notice of adoption pursuant to subdivision five of section two hundred two of this article, provided, however, that such notice of adoption shall identify the rule which is being amended, suspended or repealed pursuant to this subdivision, provided, further, for the purposes of compliance with subparagraphs (iii), (v) and (vi) of paragraph (c) of subdivision five of such section two hundred two, the text of the rule as adopted pursuant to subdivision one of this section shall be compared with the text of the rule being amended, suspended or repealed pursuant to this subdivision.

(b) An agency may not amend, suspend or repeal a rule pursuant to this subdivision if such action would constitute a substantial revision of the rule as adopted. To determine if such action constitutes a substantial revision of the adopted rule, such amendment, suspension or repeal shall be compared with the text of the rule which was filed with the secretary of state pursuant to subdivision one of this section. The provisions of this paragraph shall not apply if such amendment, suspension or repeal only delays the effective date of such rule.

3. The secretary of state shall reject any rule submitted for filing by an agency where the notice of proposed rule making for such rule has expired pursuant to the provisions of section two hundred two of this chapter.

4. If a rule requires a regulated party to develop a written plan or compliance document which must be submitted to or retained for inspection by the agency, the agency is required to, upon request of one or more regulated parties, prepare a model of such a written plan or compliance document to provide guidance as to the content and form of such written plan or compliance document and the minimum elements which such written plan or compliance document should contain. The availability of any such model plan or document shall be communicated to regulated parties through publication in the state register and by any other means which the agency determines to be efficient and effective, and shall be made available to regulated parties and the public within the time frame established for submission of the written plan or compliance documents. Unless otherwise prohibited by law, when an agency has prepared a model plan or document pursuant to this subdivision, it may extend the final date for submitting a written plan or compliance document for an

additional period, not to exceed ninety days, if such an extension is deemed necessary to permit regulated parties to use the model plan as guidance in developing their written plans or compliance documents. Whenever a model plan is prepared, the agency shall cause a notice to be published in the state register indicating that it has prepared a model plan and identifying the written plan or compliance document for which the model plan or document has been prepared. Such notice shall also indicate whether the final date for submitting a written plan or compliance document has been extended pursuant to this subdivision, and, if so, shall set forth the new final date for submission.

§§ 204. Declaratory rulings by agencies

1. On petition of any person, an agency may issue a declaratory ruling with respect to (i) the applicability to any person, property, or state of facts of any rule or statute enforceable by it, or (ii) whether any action by it should be taken pursuant to a rule. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration and disposition. A declaratory ruling shall be binding upon the agency unless it is altered or set aside by a court. The agency may not retroactively change a valid declaratory ruling, but nothing in this section shall prevent an agency from prospectively changing any declaratory ruling. A declaratory ruling shall be made available to the public. A declaratory ruling shall be subject to review in the manner provided for in article seventy-eight of the civil practice law and rules.

2. (a) Within thirty days of receipt of a petition with respect to paragraph (ii) of subdivision one of this section, an agency shall issue either a declaratory ruling or a statement declining to issue a declaratory ruling, unless the agency's rules provide

for a different time period not to exceed sixty days from receipt of such petition.

(b) [Eff. until Dec. 31, 1995.] Where an agency declines to issue a declaratory ruling described in paragraph (ii) of subdivision one of this section, or rules that agency action need not be taken pursuant to a rule, such declination and any declaratory ruling described in paragraph (ii) of subdivision one of this section may be reviewed, upon petition of the original petitioner, by the office of business permits and regulatory assistance established pursuant to article thirty-nine of the executive law. Within sixty days of receipt of such petition, the office shall issue an advisory opinion as to whether the action in question should be taken pursuant to agency rule making. The office of business permits and regulatory assistance shall promulgate such rules and regulations as may be necessary for it to carry out the provisions of this subdivision, including rules governing participation by the affected agency in the review process.
(c) Notwithstanding any inconsistent provision of law, a person may submit a petition in the manner provided for in article seventy-eight of the civil practice law and rules without first applying for a declaratory ruling pursuant to paragraph (ii) of subdivision one of this section, or to the office for an advisory opinion pursuant to this subdivision. A person may concurrently petition the court pursuant to article seventy-eight of the civil practice law and rules and petition the agency and the office pursuant to this subdivision.

§§ 205. Right to judicial review of rules

Unless an exclusive procedure or remedy is provided by law, judicial review of rules may be had upon petition presented under article seventy-eight of the civil practice law and rules,

or in an action for a declaratory judgment where applicable and proper. The agency shall be made a party to the proceedings. Such a special proceeding or action may not be maintained unless the petitioner has first requested the agency to pass upon the validity or applicability of the rule in question and action has been taken upon such a request or more than thirty days has elapsed since such request has been filed and no final action has been taken thereon or the agency has not provided for the issuance of such declaratory rulings under section two hundred four. Unless the agency acts upon such request within thirty days of its filing, such request shall be deemed to have been denied. Nothing in this section shall be construed to grant or deny to any person standing to petition under article seventy-eight of the civil practice law and rules or to bring an action for a declaratory judgment or to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is properly asserted.

§§ 206. Overlapping regulations; compliance determinations

1. It is the declared policy of this state to protect and encourage jobs, investment and economic activity and to promote the public health, safety and welfare by administering all regulatory requirements imposed by the state in a fair and reasonable manner.

2. Any person subject to a requirement imposed by a state statute or rule and to a similar requirement imposed by the federal government, may pursuant to section two hundred four of this chapter, petition the agency administering the state requirement for a declaratory ruling as to whether compliance with the federal requirement will be accepted as compliance with the state requirement. Upon receipt of such

petition, the agency shall submit a copy thereof to the office of business permits and regulatory assistance.

3. If the agency determines that compliance with the federal requirement would not satisfy the purposes or relevant provisions of the state statute involved, the agency shall so inform the petitioner in writing stating the reasons therefor and may issue a declaratory ruling to that effect. A copy of such written statement of reasons and any such declaratory ruling shall be submitted by the agency to the office of business permits and regulatory assistance.

4. If the agency determines that compliance with the federal requirement would satisfy the purposes and relevant provisions of the state statute involved but that it would not satisfy the relevant provisions of the state rule involved, the agency shall so inform the petitioner and the office of business permits and regulatory assistance and may initiate a rulemaking proceeding in accordance with this chapter to consider revising such rule to accept compliance with such federal requirement in a manner that is consistent with the requirements and purposes of the state statute.

5. If the agency determines that compliance with the federal requirement would satisfy the purposes and relevant provisions of the state statute involved, and that it would satisfy the relevant provisions of the state rule involved, the agency shall issue a declaratory ruling indicating its intention to accept compliance with the federal requirement as compliance with the state requirement, and the terms and conditions under which it intends to do so. A copy of such declaratory ruling shall be submitted by the agency to the office of business permits and regulatory assistance.

6. The office of business permits and regulatory assistance

may consider agency compliance with this section when performing its review function under section two hundred two-c of this chapter.

§§ 207. Review of existing rules

1. Unless the contrary is specifically provided by another law, any rule which is adopted on or after the effective date of this section shall be reviewed after five years, and, thereafter, at five-year intervals.

2. An agency shall submit for publication in the regulatory agenda published in January pursuant to section two hundred two-d of this article a list of the rules which must be reviewed pursuant to subdivision one of this section in the ensuing calendar year. In addition to the information required by such section two hundred two-d, for each rule so listed the agency shall provide an analysis of the need for and legal basis of such rule and shall invite public comment on the continuation or modification of the rule.

3. If an agency determines that a rule subject to the provisions of this section should be modified, it shall publish a notice of proposed rule making for such rule, which, in addition to the information otherwise required by this article, shall include a statement setting forth a reasoned justification for modification of the rule and an assessment of public comments, prepared in accordance with subdivision four-a of section two hundred two of this article, which were submitted to the agency in response to the listing of the rule in the regulatory agenda. Where appropriate, the agency shall also include in its statement a discussion of the degree to which changes in technology, economic conditions or other factors in the area affected by the rule necessitate changes in the rule.

4. If an agency determines that a rule subject to the provisions of this section should continue without modification, it shall publish a notice to that effect, which shall identify the rule and the statutory authority for the rule, and include a statement setting forth a reasoned justification for continuation of the rule without modification and an assessment of public comments, prepared in accordance with subdivision four-a of section two hundred two of this chapter, which were submitted to the agency in response to the listing of the rule in the regulatory agenda.

5. This section shall not apply to any rule which is a minor, obsolete or invalid rule, or to a rule defined in subparagraph (ii) of paragraph (a) of subdivision two of section one hundred two of this chapter.

OTHER
CODE OF FEDERAL REGULATIONS

RELEVANT PORTIONS OF:

PART 36 – NONDISCRIMINATION ON THE BASIS OF DISABILITY BY PUBLIC ACCOMMODATIONS AND IN COMMERCIAL FACILITIES

Sec.36.101 Purpose.

The purpose of this part is to implement title III of the Americans with Disabilities Act of 1990 (42 U.S.C. 12181), which prohibits discrimination on the basis of disability by public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established by this part.

Sec.36.102 Application.

(a) General. This part applies to any --

(1) Public accommodation;

(2) Commercial facility; or

(3) Private entity that offers examinations or courses related to applications, licensing, certification, or credentialing for

secondary or postsecondary education, professional, or trade purposes.

(b) Public accommodations. (1) The requirements of this part applicable to public accommodations are set forth insubparts B, C, and D of this part.

(2) The requirements of subparts B and C of this part obligate a public accommodation only with respect to the operations of a place of public accommodation.

(3) The requirements of subpart D of this part obligate a public accommodation only with respect to --

(i) A facility used as, or designed or constructed for use as, a place of public accommodation; or

(ii) A facility used as, or designed and constructed for use as, a commercial facility.

(c) Commercial facilities. The requirements of this part applicable to commercial facilities are set forth in subpart D of this part.

(d) Examinations and courses. The requirements of this part applicable to private entities that offer examinations or courses as specified in paragraph (a) of this section are set forth in Sec.36.309.

(e) Exemptions and exclusions. This part does not apply to any private club (except to the extent that the facilities of the

private club are made available to customers or patrons of a place of public accommodation), or to any religious entity or public entity.

Sec.36.103 Relationship to other laws.

(a) Rule of interpretation. Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 791) or the regulations issued by Federal agencies pursuant to that title.

(b) Section 504. This part does not affect theobligations of a recipient of Federal financial assistance to comply with the requirements of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and regulations issued by Federal agencies implementing section 504.

(c) Other laws. This part does not invalidate or limit the remedies, rights, and procedures of any other Federal laws, or State or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them.

Sec.36.104 Definitions.

For purposes of this part, the term --

Act means the Americans with Disabilities Act of 1990 (Pub. L. 101 - 336, 104 Stat. 327, 42 U.S.C. 12101 - 12213

and 47 U.S.C. 225 and 611).

Commerce means travel, trade, traffic, commerce, transportation, or communication --

(1) Among the several States;

(2) Between any foreign country or any territory or possession and any State; or

(3) Between points in the same State but through another State or foreign country.

Commercial facilities means facilities --

(1) Whose operations will affect commerce;

(2) That are intended for nonresidential use by a private entity; and

(3) That are not --

(i) Facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968, as amended (42 U.S.C. 3601 - 3631);

(ii) Aircraft; or

(iii) Railroad locomotives, railroad freight cars, railroad cabooses, commuter or intercity passenger rail cars (including

coaches, dining cars, sleeping cars, lounge cars, and food service cars), any other railroad cars described in section 242 of the Act or covered under title II of the Act, or railroad rights-of-way. For purposes of this definition, "rail" and "railroad" have the meaning given the term "railroad" in section 202(e) of the Federal Railroad Safety Act of 1970 (45 U.S.C. 431(e)).

Current illegal use of drugs means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such animpairment.

(1) The phrase physical or mental impairment means --

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine;

(ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

(iii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism;

(iv) The phrase physical or mental impairment does not include homosexuality or bisexuality.

(2) The phrase major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) The phrase has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) The phrase is regarded as having an impairment means --

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a private entity as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1)

of this definition but is treated by a private entity as having such an impairment.

(5) The term disability does not include --

(i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) Compulsive gambling, kleptomania, or pyromania; or

(iii) Psychoactive substance use disorders resulting from current illegal use of drugs.

Drug means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). The term "illegal use of drugs" does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

Individual with a disability means a person who has a disability. The term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the private entity acts on the basis of such use.

Place of public accommodation means a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the following categories --

(1) An inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of the establishment as the residence of the proprietor;

(2) A restaurant, bar, or other establishment serving food or drink;

(3) A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(4) An auditorium, convention center, lecture hall, or other place of public gathering;

(5) A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(6) A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care

provider, hospital, or other service establishment;

(7) A terminal, depot, or other station used forspecified public transportation;

(8) A museum, library, gallery, or other place of public display or collection;

(9) A park, zoo, amusement park, or other place of recreation;

(10) A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(11) A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(12) A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Private club means a private club or establishment exempted from coverage under title II of the Civil Rights Act of 1964 (42 U.S.C. 2000a(e)).

Private entity means a person or entity other than a public entity.

Public accommodation means a private entity that owns, leases (or leases to), or operates a place of public accommodation.

Public entity means --

(1) Any State or local government;

(2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act). (45 U.S.C. 541)

Qualified interpreter means an interpreter who is able to interpret effectively, accurately and impartially both receptively and expressively, using any necessary specialized vocabulary.

Readily achievable means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable factors to be considered include --

(1) The nature and cost of the action needed under this part;

(2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;

(3) The geographic separateness, and the administrative or

fiscal relationship of the site or sites in question to any parent corporation or entity;

(4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and

(5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

Religious entity means a religious organization, including a place of worship.

Service animal means any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling awheelchair, or fetching dropped items.

Specified public transportation means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of

the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

Undue burden means significant difficulty or expense. In determining whether an action would result in an undue burden, factors to be considered include --

(1) The nature and cost of the action needed under this part;

(2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;

(3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;

(4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and

(5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

Subpart B – General Requirements

Sec.36.201 General.

(a) Prohibition of discrimination. No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any private entity who owns, leases (or leases to), or operates a place of public accommodation.

(b) Landlord and tenant responsibilities. Both the landlord who owns the building that houses a place of public accommodation and the tenant who owns or operates the place of public accommodation are public accommodations subject to the requirements of this part. As between the parties, allocation of responsibility for complying with the obligations of this part may be determined by lease or other contract.

Sec.36.202 Activities.

(a) Denial of participation. A public accommodation shall not subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

(b) Participation in unequal benefit. A public accommodation shall not afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(c) Separate benefit. A public accommodation shall not provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(d) Individual or class of individuals. For purposes of paragraphs (a) through (c) of this section, the term "individual or class of individuals" refers to the clients or customers of the public accommodation that enters into the contractual, licensing, or other arrangement.

Sec.36.203 Integrated settings.

(a) General. A public accommodation shall afford goods, services, facilities, privileges, advantages, and accommodations to an individual with a disability in the

most integrated setting appropriate to the needs of the individual.

(b) Opportunity to participate. Notwithstanding the existence of separate or different programs or activities provided in accordance with this subpart, a public accommodation shall not deny an individual with a disability an opportunity to participate in such programs or activities that are not separate or different.

(c) Accommodations and services. (1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit available under this part that such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes there presentative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

Sec.36.204 Administrative methods.

A public accommodation shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration that have the effect of discriminating on the basis of disability, or that perpetuate the discrimination of others who are subject to common administrative control.

Sec.36.205 Association.

A public accommodation shall not exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

Sec.36.206 Retaliation or coercion.

(a) No private or public entity shall discriminate against any individual because that individual has opposed any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

(b) No private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the Act or this part.

(c) Illustrations of conduct prohibited by this section include, but are not limited to:

(1) Coercing an individual to deny or limit the benefits, services, or advantages to which he or she is entitled under the Act or this part;

(2) Threatening, intimidating, or interfering with an individual with a disability who is seeking to obtain or use the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation;

(3) Intimidating or threatening any person because that person is assisting or encouraging an individual or group entitled to claim the rights granted or protected by the Act or this part to exercise those rights; or

(4) Retaliating against any person because that person has participated in any investigation or action to enforce the Act or this part.

Sec.36.208 Direct threat.

(a) This part does not require a public accommodation to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of that public accommodation when that individual poses a direct threat to the health or safety of others.

(b) Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.

(c) In determining whether an individual poses a direct

threat to the health or safety of others, a public accommodation must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.

Sec.36.211 Maintenance of accessible features.

(a) A public accommodation shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part.

(b) This section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs.

Sec.36.213 Relationship of subpart B to subparts C and D of this part.

Subpart B of this part sets forth the general principles of nondiscrimination applicable to all entities subject to this part. Subparts C and D of this part provide guidance on the application of the statute to specific situations. The specific provisions, including the limitations on those provisions, control over the general provisions in circumstances where both specific and general provisions apply.

Subpart C -- Specific Requirements

Sec.36.301 Eligibility criteria.

(a) General. A public accommodation shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.

(b) Safety. A public accommodation may impose legitimate safety requirements that are necessary for safe operation. Safety requirements must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

(c) Charges. A public accommodation may not impose a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids, barrier removal, alternatives to barrier removal, and reasonable modifications in policies, practices, or procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

Sec.36.302 Modifications in policies, practices, or procedures.

(a) General. A public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods,

services,facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.

(b) Specialties -- (1) General. A public accommodation may refer an individual with a disability to another public accommodation, if that individual is seeking, or requires, treatment or services outside of the referring public accommodation's area of specialization, and if, in the normal course of its operations, the referring public accommodation would make a similar referral for an individual without a disability who seeks or requires the same treatment or services.

(2) Illustration -- medical specialties. A health care provider may refer an individual with a disability to another provider, if that individual is seeking, or requires, treatment or services outside of the referring provider's area of specialization, and if the referring provider would make a similar referral for an individual without a disability who seeks or requires the same treatment or services. A physician who specializes in treating only a particular condition cannot refuse to treat an individual with a disability for that condition, but is not required to treat the individual for a different condition.

(c) Service animals -- (1) General. Generally, a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability.

(2) Care or supervision of service animals. Nothing in this part requires a public accommodation to supervise or care for a service animal.

(d) Check-out aisles. A store with check-out aisles shall ensure that an adequate number of accessible check-out aisles are kept open during store hours, or shall otherwise modify its policies and practices, in order to ensure that an equivalent level of convenient service is provided to individuals with disabilities as is provided to others. If only one check-out aisle is accessible, and it is generally used for express service, one way of providing equivalent service is to allow persons with mobility impairments to make all their purchases at that aisle.

Sec.36.303 Auxiliary aids and services.

(a) General. A public accommodation shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense.

(b) Examples. The term "auxiliary aids and services" includes --

(1) Qualified interpreters, notetakers, computer-aided

transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(2) Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

(c) Effective communication. A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.

(d) Telecommunication devices for the deaf (TDD's). (1) A public accommodation that offers a customer, client, patient, or participant the opportunity to make outgoing telephone calls on more than an incidental convenience basis shall make available, upon request, a TDD for the use of an individual who has impaired hearing or a communication disorder.

(2) This part does not require a public accommodation to use a TDD for receiving or making telephone calls incident to

its operations.

(e) Closed caption decoders. Places of lodging that provide televisions in five or more guest rooms and hospitals that provide televisions for patient use shall provide, upon request, a means for decoding captions for use by an individual with impaired hearing.

(f) Alternatives. If provision of a particular auxiliary aid or service by a public accommodation would result in a fundamental alteration in the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or in an undue burden, i.e., significant difficulty or expense, the public accommodation shall provide an alternative auxiliary aid or service, if one exists, that would not result in an alteration or such burden but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the goods, services, facilities, privileges, advantages, or accommodations offered by the public accommodation.

Sec.36.304 Removal of barriers.

(a) General. A public accommodation shall remove architectural barriers in existing facilities, including communication barriers that are structural in nature, where such removal is readily achievable, i.e., easily accomplishable and able to be carried out without much difficulty or expense.

(b) Examples. Examples of steps to remove barriers include, but are not limited to, the following actions --

(1) Installing ramps;

(2) Making curb cuts in sidewalks and entrances;

(3) Repositioning shelves;

(4) Rearranging tables, chairs, vending machines, display racks, and other furniture;

(5) Repositioning telephones;

(6) Adding raised markings on elevator control buttons;

(7) Installing flashing alarm lights;

(8) Widening doors;

(9) Installing offset hinges to widen doorways;

(10) Eliminating a turnstile or providing an alternative accessible path;

(11) Installing accessible door hardware;

(12) Installing grab bars in toilet stalls;

(13) Rearranging toilet partitions to increase maneuvering space;

(14) Insulating lavatory pipes under sinks to prevent burns;

(15) Installing a raised toilet seat;

(16) Installing a full-length bathroom mirror;

(17) Repositioning the paper towel dispenser in a bathroom;

(18) Creating designated accessible parking spaces;

(19) Installing an accessible paper cup dispenser at an existing inaccessible water fountain;

(20) Removing high pile, low density carpeting; or

(21) Installing vehicle hand controls.

(c) Priorities. A public accommodation is urged to take measures to comply with the barrier removal requirements of this section in accordance with the following order of priorities.

(1) First, a public accommodation should take measures to provide access to a place of public accommodation from public sidewalks, parking, or public transportation. These measures include, for example, installing an entrance ramp, widening entrances, and providing accessible parking spaces.

(2) Second, a public accommodation should take measures to provide access to those areas of a place of public

accommodation where goods and services are made available to the public. These measures include, for example, adjusting the layout of display racks, rearranging tables, providing Brailled and raised character signage, widening doors, providing visual alarms, and installing ramps.

(3) Third, a public accommodation should take measures to provide access to restroom facilities. These measures include, for example, removal of obstructing furniture or vending machines, widening of doors, installation of ramps, providing accessible signage, widening of toilet stalls, and installation of grab bars.

(4) Fourth, a public accommodation should take any other measures necessary to provide access to the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

(d) Relationship to alterations requirements of subpart D of this part. (1) Except as provided in paragraph (d)(2) of this section, measures taken to comply with the barrier removal requirements of this section shall comply with the applicable requirements for alterations in Sec.36.402 and Sec..36.404 -36.406 of this part for the element being altered. The path of travel requirements of Sec.36.403 shall not apply to measures taken solely to comply with the barrier removal requirements of this section.

(2) If, as a result of compliance with the alterations requirements specified in paragraph (d)(1) of this section, the measures required to remove a barrier would not be readily achievable, a public accommodation may take other readily

achievable measures to remove the barrier that do not fully comply with the specified requirements. Such measures include, for example, providing a ramp with a steeper slope or widening a doorway to a narrower width than that mandated by the alterations requirements. No measure shall be taken, however, that poses a significant risk to the health or safety of individuals with disabilities or others.

(e) Portable ramps. Portable ramps should be used to comply with this section only when installation of a permanent ramp is not readily achievable. In order to avoid any significant risk to the health or safety of individuals with disabilities or others in using portable ramps, due consideration shall be given to safety features such as nonslip surfaces, railings, anchoring, and strength of materials.

(f) Selling or serving space. The rearrangement of temporary or movable structures, such as furniture, equipment, and display racks is not readily achievable to the extent that it results in a significant loss of selling or serving space.

(g) Limitation on barrier removal obligations. (1) The requirements for barrier removal under Sec.36.304 shall not be interpreted to exceed the standards for alterations in subpart D of this part.

(2) To the extent that relevant standards for alterations are not provided in subpart D of this part, then the requirements of Sec.36.304 shall not be interpreted to exceed the standards for new construction in subpart D of this part.

(3) This section does not apply to rolling stock and other

conveyances to the extent that Sec.36.310 applies to rolling stock and other conveyances.

Sec.36.305 Alternatives to barrier removal.

(a) General. Where a public accommodation can demonstrate that barrier removal is not readily achievable, the public accommodation shall not fail to make its goods, services, facilities, privileges, advantages, or accommodations available through alternative methods, if those methods are readily achievable.

(b) Examples. Examples of alternatives to barrier removal include, but are not limited to, the following actions --

(1) Providing curb service or home delivery;

(2) Retrieving merchandise from inaccessible shelves or racks;

(3) Relocating activities to accessible locations;

(c) Multiscreen cinemas. If it is not readily achievable to remove barriers to provide access by persons with mobility impairments to all of the theaters of a multiscreen cinema, the cinema shall establish a film rotation schedule that provides reasonable access for individuals who use wheelchairs to all films. Reasonable notice shall be provided to the public as to the location and time of accessible showings.

Sec.36.306 Personal devices and services.

This part does not require a public accommodation to provide its customers, clients, or participants with personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; or services of a personal nature including assistance in eating, toileting, or dressing.

Sec.36.307 Accessible or special goods.

(a) This part does not require a public accommodation to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities.

(b) A public accommodation shall order accessible or special goods at the request of an individual with disabilities, if, in the normal course of its operation, it makes special orders on request for unstocked goods, and if the accessible or special goods can be obtained from a supplier with whom the public accommodation customarily does business.

(c) Examples of accessible or special goods include items such as Brailled versions of books, books on audio cassettes, closed-captioned video tapes, special sizes or lines of clothing, and special foods to meet particular dietary needs.

Sec.36.308 Seating in assembly areas.

(a) Existing facilities. (1) To the extent that it is readily

achievable, a public accommodation in assembly areas shall--

(i) Provide a reasonable number of wheelchair seating spaces and seats with removable aisle-side arm rests; and

(ii) Locate the wheelchair seating spaces so that they --

(A) Are dispersed throughout the seating area;

(B) Provide lines of sight and choice of admission prices comparable to those for members of the general public;

(C) Adjoin an accessible route that also serves as a means of egress in case of emergency; and

(D) Permit individuals who use wheelchairs to sit with family members or other companions.

(2) If removal of seats is not readily achievable, a public accommodation shall provide, to the extent that it is readily achievable to do so, a portable chair or other means to permit a family member or other companion to sit with an individual who uses a wheelchair.

(3) The requirements of paragraph (a) of this section shall not be interpreted to exceed the standards for alterations in subpart D of this part.

(b) New construction and alterations. The provision and location of wheelchair seating spaces in newly constructed or altered assembly areas shall be governed by the standards

for new construction and alterations in subpart D of this part.

Sec.36.310 Transportation provided by public accommodations.

(a) General. (1) A public accommodation that provides transportation services, but that is not primarily engaged in the business of transporting people, is subject to the general and specific provisions in subparts B, C, and D of this part for its transportation operations, except as provided in this section.

(2) Examples. Transportation services subject to this section include, but are not limited to, shuttle services operated between transportation terminals and places of public accommodation, customer shuttle bus services operated by private companies and shopping centers, student transportation systems, and transportation provided within recreational facilities such as stadiums, zoos, amusement parks, and ski resorts.

(b) Barrier removal. A public accommodation subject to this section shall remove transportation barriers in existing vehicles and rail passenger cars used for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift) where such removal is readily achievable.

(c) Requirements for vehicles and systems. A public

accommodation subject to this section shall comply with the requirements pertaining to vehicles and transportation systems in the regulations issued by the Secretary of Transportation pursuant to section 306 of the Act.

Subpart D -- New Construction and Alterations

Sec.36.401 New construction.

(a) General. (1) Except as provided in paragraphs (b) and (c) of this section, discrimination for purposes of this part includes a failure to design and construct facilities for first occupancy after January 26, 1993, that are readily accessible to and usable by individuals with disabilities.

(2) For purposes of this section, a facility is designed and constructed for first occupancy after January 26, 1993, only--

(i) If the last application for a building permit or permit extension for the facility is certified to be complete, by a State, County, or local government after January 26, 1992 (or, in those jurisdictions where the government does not certify completion of applications, if the last application for a building permit or permit extension for the facility is received by the State, County, or local government after January 26, 1992); and

(ii) If the first certificate of occupancy for the facility is issued after January 26, 1993.

(b) Commercial facilities located in private residences. (1)

When a commercial facility is located in a private residence, the portion of the residence used exclusively as a residence is not covered by this subpart, but that portion used exclusively in the operation of the commercial facility or that portion used both for the commercial facility and for residential purposes is covered by the new construction and alterations requirements of this subpart.

(2) The portion of the residence covered under paragraph (b)(1) of this section extends to those elements used to enter the commercial facility, including the homeowner's front sidewalk, if any, the door or entryway, and hallways; and those portions of the residence, interior or exterior, available to or used by employees or visitors of the commercial facility, including restrooms.

(c) Exception for structural impracticability. (1) Full compliance with the requirements of this section is not required where an entity can demonstrate that it is structurally impracticable to meet the requirements. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.

(2) If full compliance with this section would be structurally impracticable, compliance with this section is required to the extent that it is not structurally impracticable. In that case, any portion of the facility that can be made accessible shall be made accessible to the extent that it is not structurally impracticable.

(3) If providing accessibility in conformance with this section to individuals with certain disabilities (e.g., those who use wheelchairs) would be structurally impracticable, accessibility shall nonetheless be ensured to persons with other types of disabilities (e.g., those who use crutches or who have sight, hearing, or mental impairments) in accordance with this section.

(d) Elevator exemption. (1) For purposes of this paragraph (d) --

(i) Professional office of a health care provider means a location where a person or entity regulated by a State to provide professional services related to the physical or mental health of an individual makes such services available to the public. The facility housing the "professional office of a health care provider" only includes floor levels housing at least one health care provider, or any floor level designed or intended for use by at least one health care provider.

(ii) Shopping center or shopping mall means --

(A) A building housing five or more sales or rental establishments; or

(B) A series of buildings on a common site, either under common ownership or common control or developed either as one project or as a series of related projects, housing five or more sales or rental establishments. For purposes of this section, places of public accommodation of the types listed in paragraph (5) of the definition of "place of public accommodation" in section Sec.36.104 are considered sales

or rental establishments. The facility housing a "shopping center or shopping mall" only includes floor levels housing at least one sales or rental establishment, or any floor level designed or intended for use by at least one sales or rental establishment.

(2) This section does not require the installation of an elevator in a facility that is less than three stories or has less than 3000 square feet per story, except with respect to any facility that houses one or more of the following:

(i) A shopping center or shopping mall, or a professional office of a health care provider.

(ii) A terminal, depot, or other station used for specified public transportation, or an airport passenger terminal. In such a facility, any area housing passenger services, including boarding and debarking, loading and unloading, baggage claim, dining facilities, and other common areas open to the public, must be on an accessible route from an accessible entrance.

(3) The elevator exemption set forth in this paragraph (d) does not obviate or limit, in any way the obligation to comply with the other accessibility requirements established in paragraph (a) of this section. For example, in a facility that houses a shopping center or shopping mall, or a professional office of a health care provider, the floors that are above or below an accessible ground floor and that do not house sales or rental establishments or a professional office of a health care provider, must meet the requirements of this section but for the elevator.

Sec.36.402 Alterations.

(a) General. (1) Any alteration to a place of public accommodation or a commercial facility, after January 26, 1992, shall be made so as to ensure that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) An alteration is deemed to be undertaken after January 26, 1992, if the physical alteration of the property begins after that date.

(b) Alteration. For the purposes of this part, an alteration is a change to a place of public accommodation or a commercial facility that affects or could affect the usability of the building or facility or any part thereof.

(1) Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. Normal maintenance, reroofing, painting or wallpapering, asbestos removal, or changes to mechanical and electrical systems are not alterations unless they affect the usability of the building or facility.

(2) If existing elements, spaces, or common areas are altered, then each such altered element, space, or area shall comply with the applicable provisions of appendix A to

this part.

(c) To the maximum extent feasible. The phrase "to the maximum extent feasible," as used in this section, applies to the occasional case where the nature of an existing facility makes it virtually impossible to comply fully with applicable accessibility standards through a planned alteration. In these circumstances, the alteration shall provide the maximum physical accessibility feasible. Any altered features of the facility that can be made accessible shall be made accessible. If providing accessibility in conformance with this section to individuals with certain disabilities (e.g., those who use wheelchairs) would not be feasible, the facility shall be made accessible to persons with other types of disabilities (e.g., those who use crutches, those who have impaired vision or hearing, or those who have other impairments).

Sec.36.403 Alterations: Path of travel.

(a) General. An alteration that affects or could affect the usability of or access to an area of a facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the cost and scope of such alterations is disproportionate to the cost of the overall alteration.

(b) Primary function. A "primary function" is a major activity for which the facility is intended. Areas that contain a

primary function include, but are not limited to, the customer services lobby of a bank, the dining area of a cafeteria, the meeting rooms in a conference center, as well as offices and other work areas in which the activities of the public accommodation or other private entity using the facility are carried out. Mechanical rooms, boiler rooms, supply storage rooms, employee lounges or locker rooms, janitorial closets, entrances, corridors, and restrooms are not areas containing a primary function.

(c) Alterations to an area containing a primary function. (1) Alterations that affect the usability of or access to an area containing a primary function include, but are not limited to --

(i) Remodeling merchandise display areas or employee work areas in a department store;

(ii) Replacing an inaccessible floor surface in the customer service or employee work areas of a bank;

(iii) Redesigning the assembly line area of a factory; or

(iv) Installing a computer center in an accounting firm.

(2) For the purposes of this section, alterations to windows, hardware, controls, electrical outlets, and signage shall not be deemed to be alterations that affect the usability of or access to an area containing a primary function.

(d) Landlord/tenant: If a tenant is making alterations as defined in Sec.36.402 that would trigger the requirements of

this section, those alterations by the tenant in areas that only the tenant occupies do not trigger a path of travel obligation upon the landlord with respect to areas of the facility under the landlord's authority, if those areas are not otherwise being altered.

(e) Path of travel. (1) A "path of travel" includes a continuous, unobstructed way of pedestrian passage by means of which the altered area may be approached, entered, and exited, and which connects the altered area with an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and other parts of the facility.

(2) An accessible path of travel may consist of walks and sidewalks, curb ramps and other interior or exterior pedestrian ramps; clear floor paths through lobbies, corridors, rooms, and other improved areas; parking access aisles; elevators and lifts; or a combination of these elements.

(3) For the purposes of this part, the term "path of travel" also includes the restrooms, telephones, and drinking fountains serving the altered area.

(f) Disproportionality. (1) Alterations made to provide an accessible path of travel to the altered area will be deemed disproportionate to the overall alteration when the cost exceeds 20% of the cost of the alteration to the primary function area.

(2) Costs that may be counted as expenditures required to provide an accessible path of travel may include:

(i) Costs associated with providing an accessible entrance and an accessible route to the altered area, for example, the cost of widening doorways or installing ramps;

(ii) Costs associated with making restrooms accessible, such as installing grab bars, enlarging toilet stalls, insulating pipes, or installing accessible faucet controls;

(iii) Costs associated with providing accessible telephones, such as relocating the telephone to an accessible height, installing amplification devices, or installing a telecommunications device for deaf persons (TDD);

(iv) Costs associated with relocating an inaccessible drinking fountain.

(g) Duty to provide accessible features in the event of disproportionality. (1) When the cost of alterations necessary to make the path of travel to the altered area fully accessible is disproportionate to the cost of the overall alteration, the path of travel shall be made accessible to the extent that it can be made accessible without incurring disproportionate costs.

(2) In choosing which accessible elements to provide, priority should be given to those elements that will provide the greatest access, in the following order:

(i) An accessible entrance;

(ii) An accessible route to the altered area;

(iii) At least one accessible restroom for each sex or a single unisex restroom;

(iv) Accessible telephones;

(v) Accessible drinking fountains; and

(vi) When possible, additional accessible elements such as parking, storage, and alarms.

(h) Series of smaller alterations. (1) The obligation to provide an accessible path of travel may not be evaded by performing a series of small alterations to the area served by a single path of travel if those alterations could have been performed as a single undertaking.

(2) (i) If an area containing a primary function has been altered without providing an accessible path of travel to that area, and subsequent alterations of that area, or a different area on the same path of travel, are undertaken within three years of the original alteration, the total cost of alterations to the primary function areas on that path of travel during the preceding three year period shall be considered in determining whether the cost of making that path of travel accessible is disproportionate.

(ii) Only alterations undertaken after January 26, 1992, shall be considered in determining if the cost of providing an accessible path of travel is disproportionate to the overall cost of the alterations.

Sec.36.406 Standards for new construction and alterations.

(a) New construction and alterations subject to this part shall comply with the standards for accessible design published as appendix A to this part (ADAAG).

(b) The chart in the appendix to this section provides guidance to the user in reading appendix A to this part (ADAAG) together with subparts A through D of this part, when determining requirements for a particular facility.

Appendix to Sec.36.406 [CHART OMITTED]

Subpart E -- Enforcement

Sec.36.501 Private suits.

(a) General. Any person who is being subjected to discrimination on the basis of disability in violation of the Act or this part or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 303 of the Act or subpart D of this part may institute a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in the civil action if the Attorney General or his or her designee certifies that the case is of general public

importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security. Nothing in this section shall require a person with a disability to engage in a futile gesture if the person has actual notice that a person or organization covered by title III of the Act or this part does not intend to comply with its provisions.

(b) Injunctive relief. In the case of violations of Sec.36.304, Sec..36.308, 36.310(b), 36.401, 36.402, 36.403, and 36.405 of this part, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by the Act or this part. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by the Act or this part.

Sec.36.502 Investigations and compliance reviews.

(a) The Attorney General shall investigate alleged violations of the Act or this part.

(b) Any individual who believes that he or she or a specific class of persons has been subjected to discrimination prohibited by the Act or this part may request the Department to institute an investigation.

(c) Where the Attorney General has reason to believe that

there may be a violation of this part, he or she may initiate a compliance review.

Sec.36.503 Suit by the Attorney General.

Following a compliance review or investigation under Sec.36.502, or at any other time in his or her discretion, the Attorney General may commence a civil action in any appropriate United States district court if the Attorney General has reasonable cause to believe that --

(a) Any person or group of persons is engaged in a pattern or practice of discrimination in violation of the Act or this part; or

(b) Any person or group of persons has been discriminated against in violation of the Act or this part and the discrimination raises an issue of general public importance.

Sec.36.504 Relief.

(a) Authority of court. In a civil action under Sec.36.503, the court --

(1) May grant any equitable relief that such court considers to be appropriate, including, to the extent required by the Act or this part --

(i) Granting temporary, preliminary, or permanent relief;

(ii) Providing an auxiliary aid or service, modification of policy, practice, or procedure, or alternative method; and

(iii) Making facilities readily accessible to and usable by individuals with disabilities;

(2) May award other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General; and

(3) May, to vindicate the public interest, assess a civil penalty against the entity in an amount

(i) Not exceeding $50,000 for a first violation; and

(ii) Not exceeding $100,000 for any subsequent violation.

(b) Single violation. For purposes of paragraph (a)(3) of this section, in determining whether a first or subsequent violation has occurred, a determination in a single action, by judgment or settlement, that the covered entity has engaged in more than one discriminatory act shall be counted as a single violation.

(c) Punitive damages. For purposes of paragraph (a)(2) of this section, the terms "monetary damages" and "such other relief" do not include punitive damages.

(d) Judicial consideration. In a civil action under Sec.36.503, the court, when considering what amount of civil penalty, if any, is appropriate, shall give consideration to any good faith effort or attempt to comply with this part by the entity. In

evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability.

Sec.36.505 Attorneys fees.

In any action or administrative proceeding commenced pursuant to the Act or this part, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

Sec.36.506 Alternative means of dispute resolution.

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Act and this part.

Sec.36.507 Effect of unavailability of technical assistance.

A public accommodation or other private entity shall not be excused from compliance with the requirements of this part because of any failure to receive technical assistance, including any failure in the development or dissemination of any technical assistance manual authorized by the Act.

Sec.36.508 Effective date.

(a) General. Except as otherwise provided in this section and in this part, this part shall become effective on January 26, 1992.

(b) Civil actions. Except for any civil action brought for a violation of section 303 of the Act, no civil action shall be brought for any act or omission described in section 302 of the Act that occurs --

(1) Before July 26, 1992, against businesses with 25 or fewer employees and gross receipts of $1,000,000 or less.

(2) Before January 26, 1993, against businesses with 10 or fewer employees and gross receipts of $500,000 or less.

(c) Transportation services provided by public accommodations. Newly purchased or leased vehicles required to be accessible by Sec.36.310 must be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, if the solicitation for the vehicle is made after August 25, 1990.

Subpart F -- Certification of State Laws or Local Building Codes

Sec.36.601 Definitions.

Assistant Attorney General means the Assistant Attorney General for Civil Rights or his or her designee.

Certification of equivalency means a final certification that a code meets or exceeds the minimum requirements of title III of the Act for accessibility and usability of facilities covered by that title.

Code means a State law or local building code or similar ordinance, or part thereof, that establishes accessibility requirements.

Model code means a nationally recognized document developed by a private entity for use by State or local jurisdictions in developing codes as defined in this section. A model code is intended for incorporation by reference or adoption in whole or in part, with or without amendment, by State or local jurisdictions.

Preliminary determination of equivalency means a preliminary determination that a code appears to meet or exceed the minimum requirements of title III of the Act for accessibility and usability of facilities covered by that title.

Submitting official means the State or local official who --

(1) Has principal responsibility for administration of a code, or is authorized to submit a code on behalf of a jurisdiction; and

(2) Files a request for certification under this subpart.

Sec.36.602 General rule.

On the application of a State or local government, the Assistant Attorney General may certify that a code meets or exceeds the minimum requirements of the Act for the accessibility and usability of places of public accommodation and commercial facilities under this part by issuing a certification of equivalency. At any enforcement proceeding under title III of the Act, such certification shall be rebuttable evidence that such State law or local ordinance does meet or exceed the minimum requirements of title III.

Sec.36.603 Filing request for certification.

(a) A submitting official may file a request for certification of a code under this subpart.

(b) Before filing a request for certification of a code, the submitting official shall ensure that --

(1) Adequate public notice of intention to file a request for certification, notice of a hearing, and notice of the location at which the request and materials can be inspected is published within the relevant jurisdiction;

(2) Copies of the proposed request and supporting materials are made available for public examination and copying at the office of the State or local agency charged with administration and enforcement of the code; and

(3) The local or State jurisdiction holds a public hearing on

the record, in the State or locality, at which the public is invited to comment on the proposed request for certification.

(c) The submitting official shall include the following materials and information in support of the request:

(1) The text of the jurisdiction's code; any standard, regulation, code, or other relevant document incorporated by reference or otherwise referenced in the code; the law creating and empowering the agency; any relevant manuals, guides, or any other interpretive information issued that pertain to the code; and any formal opinions of the State Attorney General or the chief legal officer of the jurisdiction that pertain to the code;

(2) Any model code or statute on which the pertinent code is based, and an explanation of any differences between the model and the pertinent code;

(3) A transcript of the public hearing required by paragraph (b)(3) of this section; and

(4) Any additional information that the submitting official may wish to be considered.

(d) The submitting official shall file the original and one copy of the request and of supporting materials with the Assistant Attorney General. The submitting official shall clearly label the request as a "request for certification" of a code. A copy of the request and supporting materials will be available for public examination and copying at the offices of the Assistant Attorney General in Washington, DC. The submitting official

shall ensure that copies of the request and supporting materials are available for public examination and copying at the office of the State or local agency charged with administration and enforcement of the code. The submitting official shall ensure that adequate public notice of the request for certification and of the location at which the request and materials can be inspected is published within the relevant jurisdiction.

(e) Upon receipt of a request for certification, the Assistant Attorney General may request further information that he or she considers relevant to the determinations required to be made under this subpart.

(Approved by the Office of Management and Budget under control number 1190 - 0005)

[56 FR 35592, July 26, 1991, as amended by Order No. 1679 - 93, 58 FR 17522, Apr. 5, 1993]

Sec.36.607 Effect of certification.

(a)(1) A certification shall be considered a certification of equivalency only with respect to those features or elements that are both covered by the certified code and addressed by the standards against which equivalency is measured.

(2) For example, if certain equipment is not covered by the code, the determination of equivalency cannot be used as evidence with respect to the question of whether equipment in a building built according to the code satisfies the Act's

requirements with respect to such equipment. By the same token, certification would not be relevant to construction of a facility for children, if the regulations against which equivalency is measured do not address children's facilities.

(b) A certification of equivalency is effective only with respect to the particular edition of the code for which certification is granted. Any amendments or other changes to the code after the date of the certified edition are not considered part of the certification.

(c) A submitting official may reapply for certification of amendments or other changes to a code that has already received certification.

Pt. 36, App. A

Appendix A to Part 36 – Standards for Accessible Design

ADA ACCESSIBILITY GUIDELINES FOR BUILDINGS AND FACILITIES

TABLE OF CONTENTS [OMITTED]

1. PURPOSE.

This document sets guidelines for accessibility to places of public accommodation and commercial facilities by individuals with disabilities. These guidelines are to be applied during the design, construction, and alteration of

such buildings and facilities to the extent required by regulations issued by Federal agencies, including the Department of Justice, under the Americans with Disabilities Act of 1990.

The technical specifications 4.2 through 4.35, of these guidelines are the same as those of the American National Standard Institute's document A117.1-1980, except as noted in this text by italics. However, sections 4.1.1 through 4.1.7 and sections 5 through 10 are different from ANSI A117.1 in their entirety and are printed in standard type.

The illustrations and text of ANSI A117.1 are reproduced with permission from the American National Standards Institute. Copies of the standard may be purchased from the American National Standards Institute at 1430 Broadway, New York, New York 10018.

2. GENERAL.

2.1 Provisions for Adults. The specifications in these guidelines are based upon adult dimensions and anthropometrics.

2.2* Equivalent Facilitation. Departures from particular technical and scoping requirements of this guideline by the use of other designs and technologies are permitted where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility.

3. MISCELLANEOUS INSTRUCTIONS AND DEFINITIONS.

3.4 General Terminology.

comply with. Meet one or more specifications of these guidelines.

if, if ... then. Denotes a specification that applies only when the conditions described are present.

may. Denotes an option or alternative.

shall. Denotes a mandatory specification or requirement.

should. Denotes an advisory specification or recommendation.

3.5 Definitions.

Access Aisle. An accessible pedestrian space between elements, such as parking spaces, seating, and desks, that provides clearances appropriate for use of the elements.

Accessible. Describes a site, building, facility, or portion thereof that complies with these guidelines.

Accessible Element. An element specified by these guidelines (for example, telephone, controls, and the like).

Accessible Route. A continuous unobstructed path connecting all accessible elements and spaces of a building or facility. Interior accessible routes may include corridors, floors, ramps, elevators, lifts, and clear floor space at fixtures. Exterior accessible routes may include parking access aisles, curb ramps, crosswalks at vehicular ways, walks, ramps, and lifts.

Accessible Space. Space that complies with these guidelines.

Adaptability. The ability of certain building spaces and elements, such as kitchen counters, sinks, and grab bars, to be added or altered so as to accommodate the needs of individuals with or without disabilities or to accommodate the needs of persons with different types or degrees of disability.

Addition. An expansion, extension, or increase in the gross floor area of a building or facility.

Administrative Authority. A governmental agency that adopts or enforces regulations and guidelines for the design, construction, or alteration of buildings and facilities.

Alteration. An alteration is a change to a building or facility made by, on behalf of, or for the use of a public accommodation or commercial facility, that affects or could affect the usability of the building or facility or part thereof. Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement of the structural parts or elements, and changes or rearrangement in the plan configuration of

walls and full-height partitions. Normal maintenance, reroofing, painting or wallpapering, or changes to mechanical and electrical systems are not alterations unless they affect the usability of the building or facility.

Area of Rescue Assistance. An area, which has direct access to an exit, where people who are unable to use stairs may remain temporarily in safety to await further instructions or assistance during emergency evacuation.

Building. Any structure used and intended for supporting or sheltering any use or occupancy.

Circulation Path. An exterior or interior way of passage from one place to another for pedestrians, including, but not limited to, walks, hallways, courtyards, stairways, and stair landings.

Clear. Unobstructed.

Clear Floor Space. The minimum unobstructed floor or ground space required to accommodate a single, stationary wheelchair and occupant.

Common Use. Refers to those interior and exterior rooms, spaces, or elements that are made available for the use of a restricted group of people (for example, occupants of a

homeless shelter, the occupants of an office building, or the guests of such occupants).

Cross Slope. The slope that is perpendicular to the direction of travel (see running slope).

Curb Ramp. A short ramp cutting through a curb or built up to it.

Detectable Warning. A standardized surface feature built in or applied to walking surfaces or other elements to warn visually impaired people of hazards on a circulation path.

Dwelling Unit. A single unit which provides a kitchen or food preparation area, in addition to rooms and spaces for living, bathing, sleeping, and the like. Dwelling units include a single family home or a townhouse used as a transient group home; an apartment building used as a shelter; guestrooms in a hotel that provide sleeping accommodations and food preparation areas; and other similar facilities used on a transient basis. For purposes of these guidelines, use of the term "Dwelling Unit" does not imply the unit is used as a residence.

Egress, Means of. A continuous and unobstructed way of exit travel from any point in a building or facility to a public way. A means of egress comprises vertical and horizontal travel and may include intervening room spaces, doorways, hallways, corridors, passageways, balconies, ramps, stairs, enclosures, lobbies, horizontal exits, courts and yards. An accessible means of egress is one that complies with these guidelines and does not include stairs, steps, or escalators.

Areas of rescue assistance or evacuation elevators may be included as part of accessible means of egress.

Element. An architectural or mechanical component of a building, facility, space, or site, e.g., telephone, curb ramp, door, drinking fountain, seating, or water closet.

Entrance. Any access point to a building or portion of a building or facility used for the purpose of entering. An entrance includes the approach walk, the vertical access leading to the entrance platform, the entrance platform itself, vestibules if provided, the entry door(s) or gate(s), and the hardware of the entry door(s) or gate(s).

Facility. All or any portion of buildings, structures, site improvements, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property located on a site.

Ground Floor. Any occupiable floor less than one story above or below grade with direct access to grade. A building or facility always has at least one ground floor and may have more than one ground floor as where a split level entrance has been provided or where a building is built into a hillside.

Marked Crossing. A crosswalk or other identified path intended for pedestrian use in crossing a vehicular way.

Multifamily Dwelling. Any building containing more than two dwelling units.

Occupiable. A room or enclosed space designed for human occupancy in which individuals congregate for amusement, educational or similar purposes, or in which occupants are engaged at labor, and which is equipped with means of egress, light, and ventilation.

Operable Part. A part of a piece of equipment or appliance used to insert or withdraw objects, or to activate, deactivate, or adjust the equipment or appliance (for example, coin slot, pushbutton, handle).

Path of Travel. (Reserved).

Public Use. Describes interior or exterior rooms or spaces that are made available to the general public. Public use may be provided at a building or facility that is privately or publicly owned.

Ramp. A walking surface which has a running slope greater than 1:20.

Running Slope. The slope that is parallel to the direction of travel (see cross slope).

Signage. Displayed verbal, symbolic, tactile, and pictorial information.

Site. A parcel of land bounded by a property line or a designated portion of a public right-of-way.

Site Improvement. Landscaping, paving for pedestrian and vehicular ways, outdoor lighting, recreational facilities, and the like, added to a site.

Sleeping Accommodations. Rooms in which people sleep; for example, dormitory and hotel or motel guest rooms or suites.

Space. A definable area, e.g., room, toilet room, hall, assembly area, entrance, storage room, alcove, courtyard, or lobby.

Story. That portion of a building included between the upper surface of a floor and upper surface of the floor or roof next above. If such portion of a building does not include occupiable space, it is not considered a story for purposes of these guidelines. There may be more than one floor level within a story as in the case of a mezzanine or mezzanines.

Structural Frame. The structural frame shall be considered to be the columns and the girders, beams, trusses and spandrels having direct connections to the columns and all other members which are essential to the stability of the building as a whole.

Tactile. Describes an object that can be perceived using the sense of touch.

Transient Lodging. A building, facility, or portion thereof, excluding inpatient medical care facilities, that contains one or more dwelling units or sleeping accommodations. Transient lodging may include, but is not limited to, resorts, group homes, hotels, motels, and dormitories.

Vehicular Way. A route intended for vehicular traffic, such as a street, driveway, or parking lot.

Walk. An exterior pathway with a prepared surface intended for pedestrian use, including general pedestrian areas such as plazas and courts.

4. ACCESSIBLE ELEMENTS AND SPACES: SCOPE AND TECHNICAL REQUIREMENTS.

4.1 Minimum Requirements

4.1.1* Application.

(1) General. All areas of newly designed or newly constructed buildings and facilities required to be accessible by 4.1.2 and 4.1.3 and altered portions of existing buildings and facilities required to be accessible by 4.1.6 shall comply with these guidelines, 4.1 through 4.35, unless otherwise provided in this section or as modified in a special application section.

(2) Application Based on Building Use. Special application sections 5 through 10 provide additional requirements for

restaurants and cafeterias, medical care facilities, business and mercantile, libraries, accessible transient lodging, and transportation facilities. When a building or facility contains more than one use covered by a special application section, each portion shall comply with the requirements for that use.

(3)* Areas Used Only by Employees as Work Areas. Areas that are used only as work areas shall be designed and constructed so that individuals with disabilities can approach, enter, and exit the areas. These guidelines do not require that any areas used only as work areas be constructed to permit maneuvering within the work area or be constructed or equipped (i.e., with racks or shelves) to be accessible.

(4) Temporary Structures. These guidelines cover temporary buildings or facilities as well as permanent facilities. Temporary buildings and facilities are not of permanent construction but are extensively used or are essential for public use for a period of time. Examples of temporary buildings or facilities covered by these guidelines include, but are not limited to: reviewing stands, temporary classrooms, bleacher areas, exhibit areas, temporary banking facilities, temporary health screening services, or temporary safe pedestrian passageways around a construction site. Structures, sites and equipment directly associated with the actual processes of construction, such as scaffolding, bridging, materials hoists, or construction trailers are not included.

(5) General Exceptions.

(a) In new construction, a person or entity is not required to meet fully the requirements of these guidelines where that person or entity can demonstrate that it is structurally impracticable to do so. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features. If full compliance with the requirements of these guidelines is structurally impracticable, a person or entity shall comply with the requirements to the extent it is not structurally impracticable. Any portion of the building or facility which can be made accessible shall comply to the extent that it is not structurally impracticable.

4.1.2 Accessible Sites and Exterior Facilities: New Construction. An accessible site shall meet the following minimum requirements:

(1) At least one accessible route complying with 4.3 shall be provided within the boundary of the site from public transportation stops, accessible parking spaces, passenger loading zones if provided, and public streets or sidewalks, to an accessible building entrance.

(2) At least one accessible route complying with 4.3 shall connect accessible buildings, accessible facilities, accessible elements, and accessible spaces that are on the same site.

(3) All objects that protrude from surfaces or posts into circulation paths shall comply with 4.4.

(4) Ground surfaces along accessible routes and in accessible spaces shall comply with 4.5.

(5) (a) If parking spaces are provided for self-parking by employees or visitors, or both, then accessible spaces complying with 4.6 shall be provided in each such parking area in conformance with the table below. Spaces required by the table need not be provided in the particular lot. They may be provided in a different location if equivalent or greater accessibility, in terms of distance from an accessible entrance, cost and convenience is ensured.

[TABLE OMITTED - RE: PARKING SPACES]

(a) Parking spaces designated as reserved for individuals with disabilities;

(b) Accessible passenger loading zones;

(c) Accessible entrances when not all are accessible (inaccessible entrances shall have directional signage to indicate the route to the nearest accessible entrance);

(d) Accessible toilet and bathing facilities when not all are accessible.

4.1.3 Accessible Buildings: New Construction. Accessible buildings and facilities shall meet the following minimum requirements:

(1) At least one accessible route complying with 4.3 shall connect accessible building or facility entrances with all accessible spaces and elements within the building or facility.

(2) All objects that overhang or protrude into circulation paths shall comply with 4.4.

(3) Ground and floor surfaces along accessible routes and in accessible rooms and spaces shall comply with 4.5.

(4) Interior and exterior stairs connecting levels that are not connected by an elevator, ramp, or other accessible means of vertical access shall comply with 4.9.

EXCEPTION 3: Accessible ramps complying with 4.8 may be used in lieu of an elevator.

EXCEPTION 4: Platform lifts (wheelchair lifts) complying with 4.11 of this guideline and applicable state or local codes may be used in lieu of an elevator only under the following conditions:

(a) To provide an accessible route to a performing area in an assembly occupancy.

(b) To comply with the wheelchair viewing position line-of-sight and dispersion requirements of 4.33.3.

(c) To provide access to incidental occupiable spaces and rooms which are not open to the general public and which house no more than five persons, including but not limited

to equipment control rooms and projection booths.

(d) To provide access where existing site constraints or other constraints make use of a ramp or an elevator infeasible.

(ii) If access is provided for pedestrians from a pedestrian tunnel or elevated walkway, one entrance to the building from each tunnel or walkway must be accessible.

One entrance may be considered as meeting more than one of the requirements in (b).

Because entrances also serve as emergency exits whose proximity to all parts of buildings and facilities is essential, it is preferable that all entrances be accessible.

(c) If the only entrance to a building, or tenancy in a facility, is a service entrance, that entrance shall be accessible.

(d) Entrances which are not accessible shall have directional signage complying with 4.30.1, 4.30.2, 4.30.3, and 4.30.5, which indicates the location of the nearest accessible entrance.

(9)* In buildings or facilities, or portions of buildings or facilities, required to be accessible, accessible means of egress shall be provided in the same number as required for exits by local building/life safety regulations. Where a required exit from an occupiable level above or below a level of accessible exit discharge is not accessible, an area of rescue assistance shall be provided on each such level (in a

number equal to that of inaccessible required exits). Areas of rescue assistance shall comply with 4.3.11. A horizontal exit, meeting the requirements of local building/life safety regulations, shall satisfy the requirement for an area of rescue assistance.

(16) Building Signage:

(a) Signs which designate permanent rooms and spaces shall comply with 4.30.1, 4.30.4, 4.30.5 and 4.30.6.

(b) Other signs which provide direction to or information about functional spaces of the building shall comply with 4.30.1, 4.30.2, 4.30.3, and 4.30.5.

EXCEPTION: Building directories, menus, and all other signs which are temporary are not required to comply.

4.1.5 Accessible Buildings: Additions. Each addition to an existing building or facility shall be regarded as an alteration. Each space or element added to the existing building or facility shall comply with the applicable provisions of 4.1.1 to 4.1.3, Minimum Requirements (for New Construction) and the applicable technical specifications of 4.2 through 4.35 and sections 5 through 10. Each addition that affects or could affect the usability of an area containing a primary function shall comply with 4.1.6(2).

4.1.6 Accessible Buildings: Alterations.

(1) General. Alterations to existing buildings and facilities shall comply with the following:

(a) No alteration shall be undertaken which decreases or has the effect of decreasing accessibility or usability of a building or facility below the requirements for new construction at the time of alteration.

(b) If existing elements, spaces, or common areas are altered, then each such altered element, space, feature, or area shall comply with the applicable provisions of 4.1.1 to 4.1.3 Minimum Requirements (for New Construction). If the applicable provision for new construction requires that an element, space, or common area be on an accessible route, the altered element, space, or common area is not required to be on an accessible route except as provided in 4.1.6(2) (Alterations to an Area Containing a Primary Function.)

(c) If alterations of single elements, when considered together, amount to an alteration of a room or space in a building or facility, the entire space shall be made accessible.

(d) No alteration of an existing element, space, or area of a building or facility shall impose a requirement for greater accessibility than that which would be required for new construction. For example, if the elevators and stairs in a building are being altered and the elevators are, in turn, being made accessible, then no accessibility modifications are required to the stairs connecting levels connected by the elevator. If stair modifications to correct unsafe conditions are required by other codes, the modifications shall be done in compliance with these guidelines unless technically infeasible.

(i) alterations to existing buildings or facilities with less than four exterior or interior public pay telephones would increase the total number to four or more telephones with at least one in an interior location; or

(ii) alterations to one or more exterior or interior public pay telephones occur in an existing building or facility with four or more public telephones with at least one in an interior location.

(f) If an escalator or stair is planned or installed where none existed previously and major structural modifications are necessary for such installation, then a means of accessible vertical access shall be provided that complies with the applicable provisions of 4.7, 4.8, 4.10, or 4.11.

(g) In alterations, the requirements of 4.1.3(9), 4.3.10 and 4.3.11 do not apply.

(j) EXCEPTION: In alteration work, if compliance with 4.1.6 is technically infeasible, the alteration shall provide accessibility to the maximum extent feasible. Any elements or features of the building or facility that are being altered and can be made accessible shall be made accessible within the scope of the alteration.

Technically Infeasible. Means, with respect to an alteration of a building or a facility, that it has little likelihood of being accomplished because existing structural conditions would require removing or altering a load-bearing member which

is an essential part of the structural frame; or because other existing physical or site constraints prohibit modification or addition of elements, spaces, or features which are in full and strict compliance with the minimum requirements for new construction and which are necessary to provide accessibility.

(k) EXCEPTION:

(ii) The exemption provided in paragraph (i) does not obviate or limit in any way the obligation to comply with the other accessibility requirements established in these guidelines. For example, alterations to floors above or below the ground floor must be accessible regardless of whether the altered facility has an elevator. If a facility subject to the elevator exemption set forth in paragraph (i) nonetheless has a full passenger elevator, that elevator shall meet, to the maximum extent feasible, the accessibility requirements of these guidelines.

(2) Alterations to an Area Containing a Primary Function: In addition to the requirements of 4.1.6(1), an alteration that affects or could affect the usability of or access to an area containing a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, unless such alterations are disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(3) Special Technical Provisions for Alterations to Existing Buildings and Facilities:

(a) Ramps: Curb ramps and interior or exterior ramps to be constructed on sites or in existing buildings or facilities where space limitations prohibit the use of a 1:12 slope or less may have slopes and rises as follows:

(i) A slope between 1:10 and 1:12 is allowed for a maximum rise of 6 inches.

(ii) A slope between 1:8 and 1:10 is allowed for a maximum rise of 3 inches. A slope steeper than 1:8 is not allowed.

(b) Stairs: Full extension of handrails at stairs shall not be required in alterations where such extensions would be hazardous or impossible due to plan configuration.

(g) Platform Lifts (Wheelchair Lifts): In alterations, platform lifts (wheelchair lifts) complying with 4.11 and applicable state or local codes may be used as part of an accessible route. The use of lifts is not limited to the four conditions in exception 4 of 4.1.3(5)

4.2 Space Allowance and Reach Ranges.

4.2.1* Wheelchair Passage Width. The minimum clear width for single wheelchair passage shall be 32 in (815 mm) at a point and 36 in (915 mm) continuously . . . .

4.2.2 Width for Wheelchair Passing. The minimum width

for two wheelchairs to pass is 60 in (1525 mm) . . . .

4.2.3* Wheelchair Turning Space. The space required for a wheelchair to make a 180-degree turn is a clear space of 60 in (1525 mm) diameter . . . or a T-shaped space . . . .

4.2.4* Clear Floor or Ground Space for Wheelchairs.

4.2.4.1 Size and Approach. The minimum clear floor or ground space required to accommodate a single, stationary wheelchair and occupant is 30 in by 48 in (760 mm by 1220 mm) . . . . The minimum clear floor or ground space for wheelchairs may be positioned for forward or parallel approach to an object . . . . Clear floor or ground space for wheelchairs may be part of the knee space required under some objects.

4.2.4.2 Relationship of Maneuvering Clearance to Wheelchair Spaces. One full unobstructed side of the clear floor or ground space for a wheelchair shall adjoin or overlap an accessible route or adjoin another wheelchair clear floor space. If a clear floor space is located in an alcove or otherwise confined on all or part of three sides, additional maneuvering clearances shall be provided as shown in . . . .

4.2.4.3 Surfaces for Wheelchair Spaces. Clear floor or ground spaces for wheelchairs shall comply with 4.5.

4.2.5* Forward Reach. If the clear floor space only allows forward approach to an object, the maximum high forward reach allowed shall be 48 in (1220 mm) . . . . The minimum

low forward reach is 15 in (380 mm). If the high forward reach is over an obstruction, reach and clearances shall be as shown in . . . .

4.2.6* Side Reach. If the clear floor space allows parallel approach by a person in a wheelchair, the maximum high side reach allowed shall be 54 in (1370 mm) and the low side reach shall be no less than 9 in (230 mm) above the floor . . . . If the side reach is over an obstruction, the reach and clearances shall be as shown in . . . .

4.3 Accessible Route.

4.3.1* General. All walks, halls, corridors, aisles, skywalks, tunnels, and other spaces that are part of an accessible route shall comply with 4.3.

4.3.2 Location.

(1) At least one accessible route within the boundary of the site shall be provided from public transportation stops, accessible parking, and accessible passenger loading zones, and public streets or sidewalks to the accessible building entrance they serve. The accessible route shall, to the maximum extent feasible, coincide with the route for the general public.

(2) At least one accessible route shall connect accessible buildings, facilities, elements, and spaces that are on the same site.

(3) At least one accessible route shall connect accessible building or facility entrances with all accessible spaces and elements and with all accessible dwelling units within the building or facility.

(4) An accessible route shall connect at least one accessible entrance of each accessible dwelling unit with those exterior and interior spaces and facilities that serve the accessible dwelling unit.

4.3.3 Width. The minimum clear width of an accessible route shall be 36 in (915 mm) except at doors (see 4.13.5 and 4.13.6). If a person in a wheelchair must make a turn around an obstruction, the minimum clear width of the accessible route shall be as shown in . . . .

4.3.4 Passing Space. If an accessible route has less than 60 in (1525 mm) clear width, then passing spaces at least 60 in by 60 in (1525 mm by 1525 mm) shall be located at reasonable intervals not to exceed 200 ft (61 m). A T-intersection of two corridors or walks is an acceptable passing place.

4.3.5 Head Room. Accessible routes shall comply with 4.4.2.

4.3.6 Surface Textures. The surface of an accessible route shall comply with 4.5.

4.3.7 Slope. An accessible route with a running slope greater than 1:20 is a ramp and shall comply with 4.8.

Nowhere shall the cross slope of an accessible route exceed 1:50.

4.3.8 Changes in Levels. Changes in levels along an accessible route shall comply with 4.5.2. If an accessible route has changes in level greater than 1/2 in (13 mm), then a curb ramp, ramp, elevator, or platform lift (as permitted in 4.1.3 and 4.1.6) shall be provided that complies with 4.7, 4.8, 4.10, or 4.11, respectively. An accessible route does not include stairs, steps, or escalators. See definition of "egress, means of" in 3.5.

4.3.10* Egress. Accessible routes serving any accessible space or element shall also serve as a means of egress for emergencies or connect to an accessible area of rescue assistance.

4.3.11 Areas of Rescue Assistance.

4.3.11.3* Stairway Width. Each stairway adjacent to an area of rescue assistance shall have a minimum clear width of 48 inches between handrails.

4.3.11.4* Two-way Communication. A method of two-way communication, with both visible and audible signals, shall be provided between each area of rescue assistance and the primary entry. The fire department or appropriate local authority may approve a location other than the primary entry.

4.3.11.5 Identification. Each area of rescue assistance shall be identified by a sign which states "AREA OF RESCUE ASSISTANCE" and displays the international symbol of accessibility. The sign shall be illuminated when exit sign illumination is required. Signage shall also be installed at all inaccessible exits and where otherwise necessary to clearly indicate the direction to areas of rescue assistance. In each area of rescue assistance, instructions on the use of the area under emergency conditions shall be posted adjoining the two-way communication system.

4.4 Protruding Objects.

4.4.1* General. Objects projecting from walls (for example, telephones) with their leading edges between 27 in and 80 in (685 mm and 2030 mm) above the finished floor shall protrude no more than 4 in (100 mm) into walks, halls, corridors, passageways, or aisles . . .. Objects mounted with their leading edges at or below 27 in (685 mm) above the finished floor may protrude any amount . . . . Free-standing objects mounted on posts or pylons may overhang 12 in (305 mm) maximum from 27 in to 80 in (685 mm to 2030 mm) above the ground or finished floor . . . . Protruding objects shall not reduce the clear width of an accessible route or maneuvering space . . . .

4.4.2 Head Room. Walks, halls, corridors, passageways, aisles, or other circulation spaces shall have 80 in (2030 mm) minimum clear head room . . . . If vertical clearance of an area adjoining an accessible route is reduced to less than 80 in (nominal dimension), a barrier to warn blind or

visually-impaired persons shall be provided . . . .

4.5 Ground and Floor Surfaces.

4.5.1* General. Ground and floor surfaces along accessible routes and in accessible rooms and spaces including floors, walks, ramps, stairs, and curb ramps, shall be stable, firm, slip-resistant, and shall comply with 4.5.

4.5.2 Changes in Level. Changes in level up to 1/4 in (6 mm) may be vertical and without edge treatment . . . . Changes in level between 1/4 in and 1/2 in (6 mm and 13 mm) shall be beveled with a slope no greater than 1:2 . . . . Changes in level greater than 1/2 in (13 mm) shall be accomplished by means of a ramp that complies with 4.7 or 4.8.

4.5.4 Gratings. If gratings are located in walking surfaces, then they shall have spaces no greater than 1/2 in (13 mm) wide in one direction . . . . If gratings have elongated openings, then they shall be placed so that the long dimension is perpendicular to the dominant direction of travel . . . .

4.6 Parking and Passenger Loading Zones.

4.6.1 Minimum Number. Parking spaces required to be accessible by 4.1 shall comply with 4.6.2 through 4.6.5. Passenger loading zones required to be accessible by 4.1 shall comply with 4.6.5 and 4.6.6.

4.6.2 Location. Accessible parking spaces serving a particular building shall be located on the shortest accessible route of travel from adjacent parking to an accessible entrance. In parking facilities that do not serve a particular building, accessible parking shall be located on the shortest accessible route of travel to an accessible pedestrian entrance of the parking facility. In buildings with multiple accessible entrances with adjacent parking, accessible parking spaces shall be dispersed and located closest to the accessible entrances.

4.6.3* Parking Spaces. Accessible parking spaces shall be at least 96 in (2440 mm) wide. Parking access aisles shall be part of an accessible route to the building or facility entrance and shall comply with 4.3. Two accessible parking spaces may share a common access aisle . . . . Parked vehicle overhangs shall not reduce the clear width of an accessible route. Parking spaces and access aisles shall be level with surface slopes not exceeding 1:50 (2%) in all directions.

4.6.4* Signage. Accessible parking spaces shall be designated as reserved by a sign showing the symbol of accessibility (see 4.30.7). Spaces complying with 4.1.2(5)(b) shall have an additional sign "Van-Accessible" mounted below the symbol of accessibility. Such signs shall be located so they cannot be obscured by a vehicle parked in the space.

4.6.5* Vertical Clearance. Provide minimum vertical clearance of 114 in (2895 mm) at accessible passenger loading zones and along at least one vehicle access route to such areas from site entrance(s) and exit(s). At parking spaces complying with 4.1.2(5)(b), provide minimum

vertical clearance of 98 in (2490 mm) at the parking space and along at least one vehicle access route to such spaces from site entrance(s) and exit(s).

4.6.6 Passenger Loading Zones. Passenger loading zones shall provide an access aisle at least 60 in (1525 mm) wide and 20 ft (240 in)(6100 mm) long adjacent and parallel to the vehicle pull-up space . . . . If there are curbs between the access aisle and the vehicle pull-up space, then a curb ramp complying with 4.7 shall be provided. Vehicle standing spaces and access aisles shall be level with surface slopes not exceeding 1:50 (2%) in all directions.

4.7 Curb Ramps.

4.7.1 Location. Curb ramps complying with 4.7 shall be provided wherever an accessible route crosses a curb.

4.7.2 Slope. Slopes of curb ramps shall comply with 4.8.2. The slope shall be measured as shown in . . . . Transitions from ramps to walks, gutters, or streets shall be flush and free of abrupt changes. Maximum slopes of adjoining gutters, road surface immediately adjacent to the curb ramp, or accessible route shall not exceed 1:20.

4.7.3 Width. The minimum width of a curb ramp shall be 36 in (915 mm), exclusive of flared sides.

4.7.4 Surface. Surfaces of curb ramps shall comply with 4.5.

4.7.5 Sides of Curb Ramps. If a curb ramp is located where pedestrians must walk across the ramp, or where it is not protected by handrails or guardrails, it shall have flared sides; the maximum slope of the flare shall be 1:10 . . . . Curb ramps with returned curbs may be used where pedestrians would not normally walk across the ramp . . . .

4.7.6 Built-up Curb Ramps. Built-up curb ramps shall be located so that they do not project into vehicular traffic lanes . . . .

4.7.7 Detectable Warnings. A curb ramp shall have a detectable warning complying with 4.29.2. The detectable warning shall extend the full width and depth of the curb ramp.

4.7.8 Obstructions. Curb ramps shall be located or protected to prevent their obstruction by parked vehicles.

4.7.9 Location at Marked Crossings. Curb ramps at marked crossings shall be wholly contained within the markings, excluding any flared sides . . . .

4.7.10 Diagonal Curb Ramps. If diagonal (or corner type) curb ramps have returned curbs or other well-defined edges, such edges shall be parallel to the direction of pedestrian flow. The bottom of diagonal curb ramps shall have 48 in (1220 mm) minimum clear space as shown in . . . . If diagonal curb ramps are provided at marked crossings, the 48 in (1220 mm) clear space shall be within the markings . . . . If diagonal curb ramps have flared sides, they shall also have at least a 24 in (610 mm) long segment of straight curb

located on each side of the curb ramp and within the marked crossing . . . .

4.8 Ramps.

4.8.1* General. Any part of an accessible route with a slope greater than 1:20 shall be considered a ramp and shall comply with 4.8.

4.8.2* Slope and Rise. The least possible slope shall be used for any ramp. The maximum slope of a ramp in new construction shall be 1:12. The maximum rise for any run shall be 30 in (760 mm) . . . . Curb ramps and ramps to be constructed on existing sites or in existing buildings or facilities may have slopes and rises as allowed in 4.1.6(3)(a) if space limitations prohibit the use of a 1:12 slope or less.

4.8.3 Clear Width. The minimum clear width of a ramp shall be 36 in (915 mm).

4.8.4* Landings. Ramps shall have level landings at bottom and top of each ramp and each ramp run. Landings shall have the following features:

(1) The landing shall be at least as wide as the ramp run leading to it.

(2) The landing length shall be a minimum of 60 in (1525 mm) clear.

(3) If ramps change direction at landings, the minimum

landing size shall be 60 in by 60 in (1525 mm by 1525 mm).

(4) If a doorway is located at a landing, then the area in front of the doorway shall comply with 4.13.6.

4.8.5* Handrails. If a ramp run has a rise greater than 6 in (150 mm) or a horizontal projection greater than 72 in (1830 mm), then it shall have handrails on both sides. Handrails are not required on curb ramps or adjacent to seating in assembly areas. Handrails shall comply with 4.26 and shall have the following features:

(1) Handrails shall be provided along both sides of ramp segments. The inside handrail on switchback or dogleg ramps shall always be continuous.

(2) If handrails are not continuous, they shall extend at least 12 in (305 mm) beyond the top and bottom of the ramp segment and shall be parallel with the floor or ground surface . . . .

(3) The clear space between the handrail and the wall shall be 1 - 1/2 in (38 mm).

(4) Gripping surfaces shall be continuous.

(5) Top of handrail gripping surfaces shall be mounted between 34 in and 38 in (865 mm and 965 mm) above ramp surfaces.

(6) Ends of handrails shall be either rounded or returned smoothly to floor, wall, or post.

(7) Handrails shall not rotate within their fittings.

4.8.6 Cross Slope and Surfaces. The cross slope of ramp surfaces shall be no greater than 1:50. Ramp surfaces shall comply with 4.5.

4.8.7 Edge Protection. Ramps and landings with drop-offs shall have curbs, walls, railings, or projecting surfaces that prevent people from slipping off the ramp. Curbs shall be a minimum of 2 in (50 mm) high . . . .

4.8.8 Outdoor Conditions. Outdoor ramps and their approaches shall be designed so that water will not accumulate on walking surfaces.

4.9 Stairs.

4.9.1* Minimum Number. Stairs required to be accessible by 4.1 shall comply with 4.9.

4.9.2 Treads and Risers. On any given flight of stairs, all steps shall have uniform riser heights and uniform tread widths. Stair treads shall be no less than 11 in (280 mm) wide, measured from riser to riser . . . . Open risers are not permitted.

4.9.3 Nosings. The undersides of nosings shall not be

abrupt. The radius of curvature at the leading edge of the tread shall be no greater than 1/2 in (13 mm). Risers shall be sloped or the underside of the nosing shall have an angle not less than 60 degrees from the horizontal. Nosings shall project no more than 1-1/2 in (38 mm) . . . .

4.9.4 Handrails. Stairways shall have handrails at both sides of all stairs. Handrails shall comply with 4.26 and shall have the following features:

(1) Handrails shall be continuous along both sides of stairs. The inside handrail on switchback or dogleg stairs shall always be continuous . . . .

(2) If handrails are not continuous, they shall extend at least 12 in (305 mm) beyond the top riser and at least 12 in (305 mm) plus the width of one tread beyond the bottom riser. At the top, the extension shall be parallel with the floor or ground surface. At the bottom, the handrail shall continue to slope for a distance of the width of one tread from the bottom riser; the remainder of the extension shall be horizontal . . . . Handrail extensions shall comply with 4.4.

(3) The clear space between handrails and wall shall be 1-1/2 in (38 mm).

(4) Gripping surfaces shall be uninterrupted by newel posts, other construction elements, or obstructions.

(5) Top of handrail gripping surface shall be mounted between 34 in and 38 in (865 mm and 965 mm) above stair

nosings.

(6) Ends of handrails shall be either rounded or returned smoothly to floor, wall or post.

(7) Handrails shall not rotate within their fittings.

4.9.5 Detectable Warnings at Stairs. (Reserved).

4.9.6 Outdoor Conditions. Outdoor stairs and their approaches shall be designed so that water will not accumulate on walking surfaces.

7. BUSINESS AND MERCANTILE.

7.1 General. In addition to the requirements of 4.1 to 4.35, the design of all areas used for business transactions with the public shall comply with 7.

9. ACCESSIBLE TRANSIENT LODGING.

(1) Except as specified in the special technical provisions of this section, accessible transient lodging shall comply with the applicable requirements of 4.1 through 4.35. Transient lodging includes facilities or portions thereof used for sleeping accommodations, when not classed as a medical care facility.

9.1 Hotels, Motels, Inns, Boarding Houses, Dormitories, Resorts and Other Similar Places of Transient Lodging.

9.1.1 General. All public use and common use areas are

required to be designed and constructed to comply with section 4 (Accessible Elements and Spaces: Scope and Technical Requirements).

EXCEPTION: Sections 9.1 through 9.4 do not apply to an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor.

9.1.2 Accessible Units, Sleeping Rooms, and Suites. Accessible sleeping rooms or suites that comply with the requirements of 9.2 (Requirements for Accessible Units, Sleeping Rooms, and Suites) shall be provided in conformance with the table below. In addition, in hotels, of 50 or more sleeping rooms or suites, additional accessible sleeping rooms or suites that include a roll-in shower shall also be provided in conformance with the table below. Such accommodations shall comply with the requirements of 9.2, 4.21, and . . . .

9.2.2 Minimum Requirements. An accessible unit, sleeping room or suite shall be on an accessible route complying with 4.3 and have the following accessible elements and spaces.

(1) Accessible sleeping rooms shall have a 36 in (915 mm) clear width maneuvering space located along both sides of a bed, except that where two beds are provided, this requirement can be met by providing a 36 in (915 mm) wide maneuvering space located between the two beds.

(2) An accessible route complying with 4.3 shall connect all accessible spaces and elements, including telephones, within the unit, sleeping room, or suite. This is not intended to require an elevator in multi-story units as long as the spaces identified in 9.2.2(6) and (7) are on accessible levels and the accessible sleeping area is suitable for dual occupancy.

(6) Where provided as part of an accessible unit, sleeping room, or suite, the following spaces shall be accessible and shall be on an accessible route:

(a) the living area.

(b) the dining area.

(c) at least one sleeping area.

(d) patios, terraces, or balconies.

EXCEPTION: The requirements of 4.13.8 and 4.3.8 do not apply where it is necessary to utilize a higher door threshold or a change in level to protect the integrity of the unit from wind/water damage. Where this exception results in patios, terraces or balconies that are not at an accessible level, equivalent facilitation shall be provided. (e.g., Equivalent facilitation at a hotel patio or balcony might consist of providing raised decking or a ramp to provide accessibility).

(e) at least one full bathroom (i.e., one with a water closet, a lavatory, and a bathtub or shower).

(f) if only half baths are provided, at least one half bath. (g) carports, garages or parking spaces.

(3)

Supreme Court, U.S.
FILED

02 350 SEP - 3 2002

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOHN SALVADOR, JR. and KATHLEEN A. SALVADOR,

Petitioners,

v.

ADIRONDACK PARK AGENCY OF THE STATE OF NEW YORK,

THE LAKE GEORGE PARK COMMISSION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX - VOLUME II

RECEIVED
SEP 5 2002
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Madeline Sheila Galvin
Counsel of Record
c/o Galvin and Morgan
217 Delaware Avenue
Delmar, New York 12054
(518) 439-7734
Attorneys for Petitioners

161 pp

TABLE OF CONTENTS

CIRCUIT COURT OPINION 2a

ORDER DENYING REHEARING 15a

RELEVANT PROVISIONS INVOLVED 16a

VOLUME I:

UNITED STATES CONSTITUTION, ARTICLE III 16a

UNITED STATES CONSTITUTIONAL AMENDMENTS 17a

UNITED STATES CODE 21a

STATE ADMINISTRATIVE PROCEDURE ACT 32a

CODE OF FEDERAL REGULATIONS 51a

ADA ACCESSIBILITY GUIDELINES FOR BUILDINGS AND FACILITIES 102a

VOLUME II:

ADA ACCESSIBILITY GUIDELINES FOR BUILDINGS AND FACILITIES, cont 139a

CERTIFICATION OF STATE AND LOCAL BUILDING CODES 266a

DISTRICT COURT DECISION 270a

10 TRANSPORTATION FACILITIES

10.1 General. Every station, bus stop, bus stop pad, terminal, building or other transportation facility, shall comply with the applicable provisions of 4.1 through 4.35, sections 5 through 9, and the applicable provisions of this section. The exceptions for elevators in 4.1.3(5) exception 1 and 4.1.6(1)(k) do not apply to a terminal, depot, or other station used for specified public transportation, or an airport passenger terminal, or facilities subject to Title II.

10.3 Fixed Facilities and Stations.

10.3.1 New Construction. New stations in rapid rail, light rail, commuter rail, intercity bus, intercity rail, high speed rail, and other fixed guideway systems (e.g., automated guideway transit, monorails, etc.) shall comply with the following provisions, as applicable.

(1) Elements such as ramps, elevators or other circulation devices, fare vending or other ticketing areas, and fare collection areas shall be placed to minimize the distance which wheelchair users and other persons who cannot negotiate steps may have to travel compared to the general public. The circulation path, including an accessible entrance and an accessible route, for persons with disabilities shall, to the maximum extent practicable, coincide with the circulation path for the general public. Where the circulation path is different, signage complying with 4.30.1, 4.30.2, 4.30.3, 4.30.5, and 4.30.7(1) shall be provided to indicate direction to and identify the accessible entrance and accessible route.

(2) In lieu of compliance with 4.1.3(8), at least one entrance to each station shall comply with 4.14, Entrances. If different entrances to a station serve different transportation fixed routes or groups of fixed routes, at least one entrance serving each group or route shall comply with 4.14, Entrances. All accessible entrance shall, to the maximum extent practicable, coincide with those used by the majority of the general public.

(3) Direct connections to commercial, retail, or residential facilities shall have an accessible route complying with 4.3 from the point of connection to boarding platforms and all transportation system elements used by the public. Any elements provided to facilitate future direct connections shall be on an accessible route connecting boarding platforms and all transportation system elements used by the public.

(4) Where signs are provided at entrances to stations identifying the station or the entrance, or both, at least one sign at each entrance shall comply with 4.30.4 and 4.30.6. Such signs shall be placed in uniform locations at entrances within the transit system to the maximum extent practicable.

(8) Platform edges bordering a drop-off and not protected by platform screens or guard rails shall have a detectable warning. Such detectable warnings shall comply with 4.29.2 and shall be 24 inches wide running the full length of the platform drop-off.

(9) In stations covered by this section, rail-to-platform height in new stations shall be coordinated with the floor height of new vehicles so that the vertical difference, measured when the vehicle is at rest, is within plus or minus

5/8 inch under normal passenger load conditions. For rapid rail, light rail, commuter rail, high speed rail, and intercity rail systems in new stations, the horizontal gap, measured when the new vehicle is at rest, shall be no greater than 3 in. For slow moving automated guideway "people mover" transit systems, the horizontal gap in new stations shall be no greater than 1 in.

EXCEPTION 1: Existing vehicles operating in new stations may have a vertical difference with respect to the new platform within plus or minus 1-1/2 in.

(10) Stations shall not be designed or constructed so as to require persons with disabilities to board or alight from a vehicle at a location other than one used by the general public.

(5) New direct connections to commercial, retail, or residential facilities shall, to the maximum extent feasible, have an accessible route complying with 4.3 from the point of connection to boarding platforms and all transportation system elements used by the public. Any elements provided to facilitate future direct connections shall be on an accessible route connecting boarding platforms and all transportation system elements used by the public.

10.3.3 Existing Facilities: Alterations.

(1) For the purpose of complying with 4.1.6(2) Alterations to an Area Containing a Primary Function, an area of primary function shall be as defined by applicable provisions of 49 C.F.R. 37.43(c) (Department of Transportation's ADA Rule) or 28 C.F.R. 36.403 (Department of Justice's ADA Rule).

10.5 Boat and Ferry Docks.

APPENDIX

This appendix contains materials of an advisory nature and provides additional information that should help the reader to understand the minimum requirements of the guidelines or to design buildings or facilities for greater accessibility. The paragraph numbers correspond to the sections or paragraphs of the guideline to which the material relates and are therefore not consecutive (for example, A4.2.1 contains additional information relevant to 4.2.1). Sections of the guidelines for which additional material appears in this appendix have been indicated by an asterisk. Nothing in this appendix shall in any way obviate any obligation to comply with the requirements of the guidelines itself.

A2.2 Equivalent Facilitation. Specific examples of equivalent facilitation are found in the following sections:

4.1.6(3)(c) Elevators in Alterations

4.31.9 Text Telephones

7.2 Sales and Service Counters, Teller Windows, Information Counters

9.1.4 Classes of Sleeping Accommodations

9.2.2(6)(d) Requirements for Accessible Units, Sleeping Rooms, and Suites

A4.1.1 Application.

A4.1.1(3) Areas Used Only by Employees as Work Areas.

Where there are a series of individual work stations of the same type (e.g., laboratories, service counters, ticket booths), 5%, but not less than one, of each type of work station should be constructed so that an individual with disabilities can maneuver within the work stations. Rooms housing individual offices in a typical office building must meet the requirements of the guidelines concerning doors, accessible routes, etc. but do not need to allow for maneuvering space around individual desks. Modifications required to permit maneuvering within the work area may be accomplished as a reasonable accommodation to individual employees with disabilities under Title I of the ADA.

Consideration should also be given to placing shelves in employee work areas at a convenient height for accessibility or installing commercially available shelving that is adjustable so that reasonable accommodations can be made in the future.

If work stations are made accessible they should comply with the applicable provisions of 4.2 through 4.35.

A4.1.2 Accessible Sites and Exterior Facilities: New Construction.

A4.1.3 Accessible Buildings: New Construction.

A4.1.3(5) Only full passenger elevators are covered by the accessibility provisions of 4.10. Materials and equipment hoists, freight elevators not intended for passenger use, dumbwaiters, and construction elevators are not covered by these guidelines. If a building is exempt from the elevator

requirement, it is not necessary to provide a platform lift or other means of vertical access in lieu of an elevator.

Under Exception 4, platform lifts are allowed where existing conditions make it impractical to install a ramp or elevator. Such conditions generally occur where it is essential to provide access to small raised or lowered areas where space may not be available for a ramp. Examples include, but are not limited to, raised pharmacy platforms, commercial offices raised above a sales floor, or radio and news booths.

A4.1.6 Accessible Buildings: Alterations.

A4.1.6(1)(h) When an entrance is being altered, it is preferable that those entrances being altered be made accessible to the extent feasible.

A4.2 Space Allowances and Reach Ranges.

A4.2.1 Wheelchair Passage Width.

(1) Space Requirements for Wheelchairs. Many persons who use wheelchairs need a 30 in (760 mm) clear opening width for doorways, gates, and the like, when the latter are entered head-on. If the person is unfamiliar with a building, if competing traffic is heavy, if sudden or frequent movements are needed, or if the wheelchair must be turned at an opening, then greater clear widths are needed. For most situations, the addition of an inch of leeway on either side is sufficient. Thus, a minimum clear width of 32 in (815 mm) will provide adequate clearance. However, when an opening

or a restriction in a passageway is more than 24 in (610 mm) long, it is essentially a passageway and must be at least 36 in (915 mm) wide.

(2) Space Requirements for Use of Walking Aids. Although people who use walking aids can maneuver through clear width openings of 32 in (815 mm), they need 36 in (915 mm) wide passageways and walks for comfortable gaits. Crutch tips, often extending down at a wide angle, are a hazard in narrow passageways where they might not be seen by other pedestrians. Thus, the 36 in (915 mm) width provides a safety allowance both for the person with a disability and for others.

(3) Space Requirements for Passing. Able-bodied persons in winter clothing, walking straight ahead with arms swinging, need 32 in (815 mm) of width, which includes 2 in (50 mm) on either side for sway, and another 1 in (25 mm) tolerance on either side for clearing nearby objects or other pedestrians. Almost all wheelchair users and those who use walking aids can also manage within this 32 in (815 mm) width for short distances. Thus, two streams of traffic can pass in 64 in (1625 mm) in a comfortable flow. Sixty inches (1525 mm) provides a minimum width for a somewhat more restricted flow. If the clear width is less than 60 in (1525 mm), two wheelchair users will not be able to pass but will have to seek a wider place for passing. Forty-eight inches (1220 mm) is the minimum width needed for an ambulatory person to pass a nonambulatory or semi-ambulatory person. Within this 48 in (1220 mm) width, the ambulatory person will have to twist to pass a wheelchair user, a person with a service animal, or a semi-ambulatory person. There will be little leeway for swaying or missteps. . . .

A4.2.3 Wheelchair Turning Space.
These guidelines specify a minimum space of 60 in (1525 mm) diameter or a 60 in by 60 in (1525 mm by 1525 mm) T-shaped space for a pivoting 180-degree turn of a wheelchair. This space is usually satisfactory for turning around, but many people will not be able to turn without repeated tries and bumping into surrounding objects. The space shown in . . . will allow most wheelchair users to complete U-turns without difficulty.

A4.2.4 Clear Floor or Ground Space for Wheelchairs.
The wheelchair and user shown in . . .represent typical dimensions for a large adult male. The space requirements in this guideline are based upon maneuvering clearances that will accommodate most wheelchairs. Fig. A3 provides a uniform reference for design not covered by this guideline.

A4.2.5 & A4.2.6 Reach. Reach ranges for persons seated in wheelchairs may be further clarified by . . . . These drawings approximate in the plan view the information shown . . . .

A4.3 Accessible Route.

A4.3.1 General.

(1) Travel Distances. Many people with mobility impairments can move at only very slow speeds; for many, traveling 200 ft (61 m) could take about 2 minutes. This assumes a rate of about 1.5 ft/s (455 mm/s) on level ground. It also assumes that the traveler would move continuously. However, on trips over 100 ft (30 m), disabled people are apt to rest frequently, which substantially increases their trip times. Resting periods of 2 minutes for every 100 ft (30 m)

can be used to estimate travel times for people with severely limited stamina. In inclement weather, slow progress and resting can greatly increase a disabled person's exposure to the elements.

(2) Sites. Level, indirect routes or those with running slopes lower than 1:20 can sometimes provide more convenience than direct routes with maximum allowable slopes or with ramps.

A4.3.11.3 Stairway Width. A 48 in (1220 mm) wide exit stairway is needed to allow assisted evacuation (e.g., carrying a person in a wheelchair) without encroaching on the exit path for ambulatory persons.

A4.4 Protruding Objects.

A4.4.1 General. Service animals are trained to recognize and avoid hazards. However, most people with severe impairments of vision use the long cane as an aid to mobility. The two principal cane techniques are the touch technique, where the cane arcs from side to side and touches points outside both shoulders; and the diagonal technique, where the cane is held in a stationary position diagonally across the body with the cane tip touching or just above the ground at a point outside one shoulder and the handle or grip extending to a point outside the other shoulder. The touch technique is used primarily in uncontrolled areas, while the diagonal technique is used primarily in certain limited, controlled, and familiar environments. Cane users are often trained to use both techniques.

Potential hazardous objects are noticed only if they fall within the detection range of canes . . . . Visually impaired people walking toward an object can detect an overhang if its lowest surface is not higher than 27 in (685 mm). When walking alongside protruding objects, they cannot detect overhangs. Since proper cane and service animal techniques keep people away from the edge of a path or from walls, a slight overhang of no more than 4 in (100 mm) is not hazardous.

A4.5 Ground and Floor Surfaces.

A4.5.1 General. People who have difficulty walking or maintaining balance or who use crutches, canes, or walkers, and those with restricted gaits are particularly sensitive to slipping and tripping hazards. For such people, a stable and regular surface is necessary for safe walking, particularly on stairs. Wheelchairs can be propelled most easily on surfaces that are hard, stable, and regular. Soft loose surfaces such as shag carpet, loose sand or gravel, wet clay, and irregular surfaces such as cobblestones can significantly impede wheelchair movement.

Slip resistance is based on the frictional force necessary to keep a shoe heel or crutch tip from slipping on a walking surface under conditions likely to be found on the surface. While the dynamic coefficient of friction during walking varies in a complex and non-uniform way, the static coefficient of friction, which can be measured in several ways, provides a close approximation of the slip resistance of a surface. Contrary to popular belief, some slippage is

necessary to walking, especially for persons with restricted gaits; a truly "non-slip" surface could not be negotiated.

The Occupational Safety and Health Administration recommends that walking surfaces have a static coefficient of friction of 0.5. A research project sponsored by the Architectural and

Transportation Barriers Compliance Board (Access Board) conducted tests with persons with disabilities and concluded that a higher coefficient of friction was needed by such persons. A static coefficient of friction of 0.6 is recommended for accessible routes and 0.8 for ramps.

It is recognized that the coefficient of friction varies considerably due to the presence of contaminants, water, floor finishes, and other factors not under the control of the designer or builder and not subject to design and construction guidelines and that compliance would be difficult to measure on the building site. Nevertheless, many common building materials suitable for flooring are now labeled with information on the static coefficient of friction. While it may not be possible to compare one product directly with another, or to guarantee a constant measure, builders and designers are encouraged to specify materials with appropriate values. As more products include information on slip resistance, improved uniformity in measurement and specification is likely. The Access Board's advisory guidelines on Slip Resistant Surfaces provides additional information on this subject.

Cross slopes on walks and ground or floor surfaces can cause considerable difficulty in propelling a wheelchair in a

straight line.

A4.6 Parking and Passenger Loading Zones.

A4.8 Ramps.

A4.8.1 General. Ramps are essential for wheelchair users if elevators or lifts are not available to connect different levels. However, some people who use walking aids have difficulty with ramps and prefer stairs.

A4.8.2 Slope and Rise. Ramp slopes between 1:16 and 1:20 are preferred. The ability to manage an incline is related to both its slope and its length. Wheelchair users with disabilities affecting their arms or with low stamina have serious difficulty using inclines. Most ambulatory people and most people who use wheelchairs can manage a slope of 1:16. Many people cannot manage a slope of 1:12 for 30 ft (9 m).

A4.8.4 Landings. Level landings are essential toward maintaining an aggregate slope that complies with these guidelines. A ramp landing that is not level causes individuals using wheelchairs to tip backward or bottom out when the ramp is approached.

A4.8.5 Handrails. The requirements for stair and ramp handrails in this guideline are for adults. When children are principal users in a building or facility, a second set of handrails at an appropriate height can assist them and aid in preventing accidents.

A4.9 Stairs.

A4.9.1 Minimum Number. Only interior and exterior stairs connecting levels that are not connected by an elevator, ramp, or other accessible means of vertical access have to comply with 4.9.

A4.11 Platform Lifts (Wheelchair Lifts).

A4.11.2 Other Requirements. Inclined stairway chairlifts, and inclined and vertical platform lifts (wheelchair lifts) are available for short-distance, vertical transportation of people with disabilities. Care should be taken in selecting lifts as some lifts are not equally suitable for use by both wheelchair users and semi-ambulatory individuals.

A4.29 Detectable Warnings.

A4.29.2 Detectable Warnings on Walking Surfaces. The material used to provide contrast should contrast by at least 70%.

Contrast in percent is determined by:

Contrast = [(B1 - B2)/B1] x 100

where B1 = light reflectance value (LRV) of the lighter area and B2 = light reflectance value (LRV) of the darker area.

Note that in any application both white and black are never absolute; thus, B1 never equals 100 and B2 is always greater

than 0.

A4.30 Signage.

Pt. 36, App. B
Appendix B to Part 36 -- Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities (Published July 26, 1991)

Subpart A -- General

Section 36.101 Purpose

Section 36.101 states the purpose of the rule, which is to effectuate title III of the Americans with Disabilities Act of 1990. This title prohibits discrimination on the basis of disability by public accommodations, requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established by this part, and requires that examinations or courses related to licensing or certification for professional or trade purposes be accessible to persons with disabilities.

Section 36.102 Application

Section 36.102 specifies the range of entities and facilities that have obligations under the final rule. The rule applies to any public accommodation or commercial facility as those terms are defined in Sec.36.104. It also applies, in

accordance with section 309 of the ADA, to private entities that offer examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes. Except as provided in Sec.36.206, "Retaliation or coercion," this part does not apply to individuals other than public accommodations or to public entities. Coverage of private individuals and public entities is discussed in the preamble to Sec.36.206.

As defined in Sec.36.104, a public accommodation is a private entity that owns, leases or leases to, or operates a place of public accommodation. Section 36.102(b)(2) emphasizes that the general and specific public accommodations requirements of subparts B and C obligate a public accommodation only with respect to the operations of a place of public accommodation. This distinction is drawn in recognition of the fact that a private entity that meets the regulatory definition of public accommodation could also own, lease or lease to, or operate facilities that are not places of public accommodation. The rule would exceed the reach of the ADA if it were to apply the public accommodations requirements of subparts B and C to the operations of a private entity that do not involve a place of public accommodation. Similarly, Sec.36.102(b)(3) provides that the new construction and alterations requirements of subpart D obligate a public accommodation only with respect to facilities used as, or designed or constructed for use as, places of public accommodation or commercial facilities.

On the other hand, as mandated by the ADA and reflected in Sec.36.102(c), the new construction and alterations requirements of subpart D apply to a commercial facility

whether or not the facility is a place of public accommodation, or is owned, leased, leased to, or operated by a public accommodation.

Section 36.102(e) states that the rule does not apply to any private club, religious entity, or public entity. Each of these terms is defined in Sec.36.104. The exclusion of private clubs and religious entities is derived from section 307 of the ADA; and the exclusion of public entities is based on the statutory definition of public accommodation in section 301(7) of the ADA, which excludes entities other than private entities from coverage under title III of the ADA.

Section 36.103 Relationship to Other Laws

Section 36.103 is derived from sections 501 (a) and (b) of the ADA. Paragraph (a) provides that, except as otherwise specifically provided by this part, the ADA is not intended to apply lesser standards than are required under title V of the Rehabilitation Act of 1973, as amended (29 U.S.C. 790 - 794), or the regulations implementing that title. The standards of title V of the Rehabilitation Act apply for purposes of the ADA to the extent that the ADA has not explicitly adopted a different standard from title V. Where the ADA explicitly provides a different standard from section 504, the ADA standard applies to the ADA, but not to section 504. For example, section 504 requires that all federally assisted programs and activities be readily accessible to and usable by individuals with handicaps, even if major structural alterations are necessary to make a program accessible. Title III of the ADA, in contrast, only requires alterations to existing facilities if the modifications are "readily achievable," that is, able to be accomplished easily and

without much difficulty or expense. A public accommodation that is covered under both section 504 and the ADA is still required to meet the "program accessibility" standard in order to comply with section 504, but would not be in violation of the ADA unless it failed to make "readily achievable" modifications. On the other hand, an entity covered by the ADA is required to make "readily achievable" modifications, even if the program can be made accessible without any architectural modifications. Thus, an entity covered by both section 504 and title III of the ADA must meet both the "program accessibility" requirement and the "readily achievable" requirement.

Paragraph (b) makes explicit that the rule does not affect the obligation of recipients of Federal financial assistance to comply with the requirements imposed under section 504 of the Rehabilitation Act of 1973.

Paragraph (c) makes clear that Congress did not intend to displace any of the rights or remedies provided by other Federal laws or other State or local laws (including State common law) that provide greater or equal protection to individuals with disabilities. A plaintiff may choose to pursue claims under a State law that does not confer greater substantive rights, or even confers fewer substantive rights, if the alleged violation is protected under the alternative law and the remedies are greater. For example, assume that a person with a physical disability seeks damages under a State law that allows compensatory and punitive damages for discrimination on the basis of physical disability, but does not allow them on the basis of mental disability. In that situation, the State law would provide narrower coverage, by excluding mental disabilities, but broader remedies, and

an individual covered by both laws could choose to bring an action under both laws. Moreover, State tort claims confer greater remedies and are not preempted by the ADA. A plaintiff may join a State tort claim to a case brought under the ADA. In such a case, the plaintiff must, of course, prove all the elements of the State tort claim in order to prevail under that cause of action.

A commenter had concerns about privacy requirements for banking transactions using telephone relay services. Title IV of the Act provides adequate protections for ensuring the confidentiality of communications using the relay services. This issue is more appropriately addressed by the Federal Communications Commission in its regulation implementing title IV of the Act.

Section 36.104 Definitions

"Act." The word "Act" is used in the regulation to refer to the Americans with Disabilities Act of 1990, Pub. L. 101 - 336, which is also referred to as the "ADA."

"Commerce." The definition of "commerce" is identical to the statutory definition provided in section 301(l) of the ADA. It means travel, trade, traffic, commerce, transportation, or communication among the several States, between any foreign country or any territory or possession and any State, or between points in the same State but through another State or foreign country. Commerce is defined in the same manner as in title II of the Civil Rights Act of 1964, which prohibits racial discrimination in public accommodations.

The term "commerce" is used in the definition of "place of public accommodation." According to that definition, one of the criteria that an entity must meet before it can be considered a place of public accommodation is that its operations affect commerce. The term "commerce" is similarly used in the definition of "commercial facility."

The use of the phrase "operations affect commerce" applies the full scope of coverage of the Commerce Clause of the Constitution in enforcing the ADA. The Constitution gives Congress broad authority to regulate interstate commerce, including the activities of local business enterprises (e.g., a physician's office, a neighborhood restaurant, a laundromat, or a bakery) that affect interstate commerce through the purchase or sale of products manufactured in other States, or by providing services to individuals from other States. Because of the integrated nature of the national economy, the ADA and this final rule will have extremely broad application.

"Commercial facilities" are those facilities that are intended for nonresidential use by a private entity and whose operations affect commerce. As explained under Sec.36.401, "New construction," the new construction and alteration requirements of subpart D of the rule apply to all commercial facilities, whether or not they are places of public accommodation. Those commercial facilities that are not places of public accommodation are not subject to the requirements of subparts B and C (e.g., those requirements concerning auxiliary aids and general nondiscrimination provisions).

Congress recognized that the employees within commercial facilities would generally be protected under title I (employment) of the Act. However, as the House Committee on Education and Labor pointed out, "[t]o the extent that new facilities are built in a manner that make[s] them accessible to all individuals, including potential employees, there will be less of a need for individual employers to engage in reasonable accommodations for particular employees." H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 117 (1990) [hereinafter "Education and Labor report"]. While employers of fewer than 15 employees are not covered by title I's employment discrimination provisions, there is no such limitation with respect to new construction covered under title III. Congress chose not to so limit the new construction provisions because of its desire for a uniform requirement of accessibility in new construction, because accessibility can be accomplished easily in the design and construction stage, and because future expansion of a business or sale or lease of the property to a larger employer or to a business that is a place of public accommodation is always a possibility.

The term "commercial facilities" is not intended to be defined by dictionary or common industry definitions. Included in this category are factories, warehouses, office buildings, and other buildings in which employment may occur. The phrase, "whose operations affect commerce," is to be read broadly, to include all types of activities reached under the commerce clause of the Constitution.

Privately operated airports are also included in the category of commercial facilities. They are not, however, places of

public accommodation because they are not terminals used for "specified public transportation." (Transportation by aircraft is specifically excluded from the statutory definition of "specified public transportation.") Thus, privately operated airports are subject to the new construction and alteration requirements of this rule (subpart D) but not to subparts B and C. (Airports operated by public entities are covered by title II of the Act.) Places of public accommodation located within airports, such as restaurants, shops, lounges, or conference centers, however, are covered by subparts B and C of this part.

The statute's definition of "commercial facilities" specifically includes only facilities "that are intended for nonresidential use" and specifically exempts those facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968, as amended (42 U.S.C. 3601 - 3631). The interplay between the Fair Housing Act and the ADA with respect to those facilities that are "places of public accommodation" was the subject of many comments and is addressed in the preamble discussion of the definition of "place of public accommodation."

"Disability." The definition of the term "disability" is comparable to the definition of the term "individual with handicaps" in section 7(8)(B) of the Rehabilitation Act and section 802(h) of the Fair Housing Act. The Education and Labor Committee report makes clear that the analysis of the term "individual with handicaps" by the Department of Health, Education, and Welfare in its regulations implementing section 504 (42 FR 22685 (May 4, 1977)) and the analysis by the Department of Housing and Urban

Development in its regulation implementing the Fair Housing Amendments Act of 1988 (54 FR 3232 (Jan. 23, 1989)) should also apply fully to the term "disability" (Education and Labor report at 50).

The use of the term "disability" instead of "handicap" and the term "individual with a disability" instead of "individual with handicaps" represents an effort by the Congress to make use of up-to-date, currently accepted terminology. The terminology applied to individuals with disabilities is a very significant and sensitive issue. As with racial and ethnic terms, the choice of words to describe a person with a disability is overlaid with stereotypes, patronizing attitudes, and other emotional connotations. Many individuals with disabilities, and organizations representing such individuals, object to the use of such terms as "handicapped person" or "the handicapped." In other recent legislation, Congress also recognized this shift in terminology, e.g., by changing the name of the National Council on the Handicapped to the National Council on Disability (Pub. L. 100 - 630).

In enacting the Americans with Disabilities Act, Congress concluded that it was important for the current legislation to use terminology most in line with the sensibilities of most Americans with disabilities. No change in definition or substance is intended nor should be attributed to this change in phraseology.

The term "disability" means, with respect to an individual --

(A) A physical or mental impairment that substantially limits one or more of the major life activities of such

individual;

(B) A record of such an impairment; or

(C) Being regarded as having such an impairment.

If an individual meets any one of these three tests, he or she is considered to be an individual with a disability for purposes of coverage under the Americans with Disabilities Act.

Congress adopted this same basic definition of "disability," first used in the Rehabilitation Act of 1973 and in the Fair Housing Amendments Act of 1988, for a number of reasons. It has worked well since it was adopted in 1974. There is a substantial body of administrative interpretation and judicial precedent on this definition. Finally, it would not be possible to guarantee comprehensiveness by providing a list of specific disabilities, especially because new disorders may be recognized in the future, as they have since the definition was first established in 1974.

Test A -- A Physical or Mental Impairment That Substantially Limits One or More of the Major Life Activities of Such Individual

Physical or mental impairment. Under the first test, an individual must have a physical or mental impairment. As explained in paragraph (1) (i) of the definition, "impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs

(including speech organs that are not respiratory, such as vocal cords, soft palate, and tongue); respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine. It also means any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. This list closely tracks the one used in the regulations for section 504 of the Rehabilitation Act of 1973 (see, e.g., 45 CFR 84.3(j)(2)(i)).

Many commenters asked that "traumatic brain injury" be added to the list in paragraph (1)(i). Traumatic brain injury is already included because it is a physiological condition affecting one of the listed body systems, i.e., "neurological." Therefore, it was unnecessary for the Department to add the term to the regulation.

It is not possible to include a list of all the specific conditions, contagious and noncontagious diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that other conditions or disorders may be identified in the future. However, the list of examples in paragraph (1)(iii) of the definition includes: Orthopedic, visual, speech and hearing impairments; cerebral palsy; epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

The examples of "physical or mental impairments" in paragraph (1)(iii) are the same as those contained in many section 504 regulations, except for the addition of the phrase "contagious and noncontagious" to describe the types of diseases and conditions included, and the addition of "HIV disease (symptomatic or asymptomatic)" and "tuberculosis" to the list of examples. These additions are based on the ADA committee reports, caselaw, and official legal opinions interpreting section 504. In School Board of Nassau County v. Arline, 480 U.S. 273 (1987), a case involving an individual with tuberculosis, the Supreme Court held that people with contagious diseases are entitled to the protections afforded by section 504. Following the Arline decision, this Department's Office of Legal Counsel issued a legal opinion that concluded that symptomatic HIV disease is an impairment that substantially limits a major life activity; therefore it has been included in the definition of disability under this part. The opinion also concluded that asymptomatic HIV disease is an impairment that substantially limits a major life activity, either because of its actual effect on the individual with HIV disease or because the reactions of other people to individuals with HIV disease cause such individuals to be treated as though they are disabled. See Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), reprinted in Hearings on S. 933, the Americans with Disabilities Act, Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources, 101st Cong., 1st Sess. 346 (1989). The phrase "symptomatic or asymptomatic" was inserted in the final rule after "HIV disease" in response to commenters who suggested that the clarification was necessary to give full meaning to the

Department's opinion.

Paragraph (1)(iv) of the definition states that the phrase "physical or mental impairment" does not include homosexuality or bisexuality. These conditions were never considered impairments under other Federal disability laws. Section 511(a) of the statute makes clear that they are likewise not to be considered impairments under the Americans with Disabilities Act.

Physical or mental impairment does not include simple physical characteristics, such as blue eyes or black hair. Nor does it include environmental, cultural, economic, or other disadvantages, such as having a prison record, or being poor. Nor is age a disability. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. However, a person who has these characteristics and also has a physical or mental impairment may be considered as having a disability for purposes of the Americans with Disabilities Act based on the impairment.

Substantial limitation of a major life activity. Under Test A, the impairment must be one that "substantially limits a major life activity." Major life activities include such things as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. For example, a person who is paraplegic is substantially limited in the major life activity of walking, a person who is blind is substantially limited in the major life activity of seeing, and a person who is mentally retarded is substantially limited in the major life activity of learning. A person with traumatic brain injury is substantially limited in

the major life activities of caring for one's self, learning, and working because of memory deficit, confusion, contextual difficulties, and inability to reason appropriately.

A person is considered an individual with a disability for purposes of Test A, the first prong of the definition, when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. A person with a minor, trivial impairment, such as a simple infected finger, is not impaired in a major life activity. A person who can walk for 10 miles continuously is not substantially limited in walking merely because, on the eleventh mile, he or she begins to experience pain, because most people would not be able to walk eleven miles without experiencing some discomfort.

The Department received many comments on the proposed rule's inclusion of the word "temporary" in the definition of "disability." The preamble indicated that impairments are not necessarily excluded from the definition of "disability" simply because they are temporary, but that the duration, or expected duration, of an impairment is one factor that may properly be considered in determining whether the impairment substantially limits a major life activity. The preamble recognized, however, that temporary impairments, such as a broken leg, are not commonly regarded as disabilities, and only in rare circumstances would the degree of the limitation and its expected duration be substantial: Nevertheless, many commenters objected to inclusion of the word "temporary" both because it is not in the statute and because it is not contained in the definition of "disability" set forth in the title I regulations of the Equal Employment

Opportunity Commission (EEOC). The word "temporary" has been deleted from the final rule to conform with the statutory language. The question of whether a temporary impairment is a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual.

The question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modifications or auxiliary aids and services. For example, a person with hearing loss is substantially limited in the major life activity of hearing, even though the loss may be improved through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, that substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

Many commenters asked that environmental illness (also known as multiple chemical sensitivity) as well as allergy to cigarette smoke be recognized as disabilities. The Department, however, declines to state categorically that these types of allergies or sensitivities are disabilities, because the determination as to whether an impairment is a disability depends on whether, given the particular circumstances at issue, the impairment substantially limits one or more major life activities (or has a history of, or is regarded as having such an effect).

Sometimes respiratory or neurological functioning is so

severely affected that an individual will satisfy the requirements to be considered disabled under the regulation. Such an individual would be entitled to all of the protections afforded by the Act and this part. In other cases, individuals may be sensitive to environmental elements or to smoke but their sensitivity will not rise to the level needed to constitute a disability. For example, their major life activity of breathing may be somewhat, but not substantially, impaired. In such circumstances, the individuals are not disabled and are not entitled to the protections of the statute despite their sensitivity to environmental agents.

In sum, the determination as to whether allergies to cigarette smoke, or allergies or sensitivities characterized by the commenters as environmental illness are disabilities covered by the regulation must be made using the same case-by-case analysis that is applied to all other physical or mental impairments. Moreover, the addition of specific regulatory provisions relating to environmental illness in the final rule would be inappropriate at this time pending future consideration of the issue by the Architectural and Transportation Barriers Compliance Board, the Environmental Protection Agency, and the Occupational Safety and Health Administration of the Department of Labor.

Test B -- A Record of Such an Impairment

This test is intended to cover those who have a record of an impairment. As explained in paragraph (3) of the rule's definition of disability, this includes a person who has a history of an impairment that substantially limited a major life activity, such as someone who has recovered from an impairment. It also includes persons who have been

misclassified as having an impairment.

This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment that previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment is prohibited. Frequently occurring examples of the first group (those who have a history of an impairment) are persons with histories of mental or emotional illness, heart disease, or cancer; examples of the second group (those who have been misclassified as having an impairment) are persons who have been misclassified as having mental retardation or mental illness.

Test C -- Being Regarded as Having Such an Impairment

This test, as contained in paragraph (4) of the definition, is intended to cover persons who are treated by a private entity or public accommodation as having a physical or mental impairment that substantially limits a major life activity. It applies when a person is treated as if he or she has an impairment that substantially limits a major life activity, regardless of whether that person has an impairment.

The Americans with Disabilities Act uses the same "regarded as" test set forth in the regulations implementing section 504 of the Rehabilitation Act. See, e.g., 28 CFR 42.540(k)(2)(iv), which provides:

(iv) "Is regarded as having an impairment" means (A) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as

constituting such a limitation; (B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) Has none of the impairments defined in paragraph (k)(2)(i) of this section but is treated by a recipient as having such an impairment.

The perception of the private entity or public accommodation is a key element of this test. A person who perceives himself or herself to have an impairment, but does not have an impairment, and is not treated as if he or she has an impairment, is not protected under this test. A person would be covered under this test if a restaurant refused to serve that person because of a fear of "negative reactions" of others to that person. A person would also be covered if a public accommodation refused to serve a patron because it perceived that the patron had an impairment that limited his or her enjoyment of the goods or services being offered.

For example, persons with severe burns often encounter discrimination in community activities, resulting in substantial limitation of major life activities. These persons would be covered under this test based on the attitudes of others towards the impairment, even if they did not view themselves as "impaired."

The rationale for this third test, as used in the Rehabilitation Act of 1973, was articulated by the Supreme Court in Arline, 480 U.S. 273 (1987). The Court noted that, although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could

nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." Id. at 283. The Court concluded that, by including this test in the Rehabilitation Act's definition, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." Id. at 284.

Thus, a person who is not allowed into a public accommodation because of the myths, fears, and stereotypes associated with disabilities would be covered under this third test whether or not the person's physical or mental condition would be considered a disability under the first or second test in the definition.

If a person is refused admittance on the basis of an actual or perceived physical or mental condition, and the public accommodation can articulate no legitimate reason for the refusal (such as failure to meet eligibility criteria), a perceived concern about admitting persons with disabilities could be inferred and the individual would qualify for coverage under the "regarded as" test. A person who is covered because of being regarded as having an impairment is not required to show that the public accommodation's perception is inaccurate (e.g., that he will be accepted by others, or that insurance rates will not increase) in order to be admitted to the public accommodation.

Paragraph (5) of the definition lists certain conditions that are not included within the definition of "disability." The excluded conditions are: transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity

disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. Unlike homosexuality and bisexuality, which are not considered impairments under either the Americans with Disabilities Act (see the definition of "disability," paragraph (1)(iv)) or section 504, the conditions listed in paragraph (5), except for transvestism, are not necessarily excluded as impairments under section 504. (Transvestism was excluded from the definition of disability for section 504 by the Fair Housing Amendments Act of 1988, Pub. L. 100 - 430, Sec.6(b).) The phrase "current illegal use of drugs" used in this definition is explained in the preamble to Sec.36.209.

"Facility." "Facility" means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located. Committee reports made clear that the definition of facility was drawn from the definition of facility in current Federal regulations (see, e.g., Education and Labor report at 114). It includes both indoor and outdoor areas where human-constructed improvements, structures, equipment, or property have been added to the natural environment.

The term "rolling stock or other conveyances" was not included in the definition of facility in the proposed rule. However, commenters raised questions about the applicability of this part to places of public accommodation operated in mobile facilities (such as cruise ships, floating

restaurants, or mobile health units). Those places of public accommodation are covered under this part, and would be included in the definition of "facility." Thus the requirements of subparts B and C would apply to those places of public accommodation. For example, a covered entity could not discriminate on the basis of disability in the full and equal enjoyment of the facilities (Sec.36.201). Similarly, a cruise line could not apply eligibility criteria to potential passengers in a manner that would screen out individuals with disabilities, unless the criteria are "necessary," as provided in Sec.36.301.

However, standards for new construction and alterations of such facilities are not yet included in the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) adopted by Sec.36.406 and incorporated in appendix A. The Department therefore will not interpret the new construction and alterations provisions of subpart D to apply to the types of facilities discussed here, pending further development of specific requirements.

Requirements pertaining to accessible transportation services provided by public accommodations are included in Sec.36.310 of this part; standards pertaining to accessible vehicles will be issued by the Secretary of Transportation pursuant to section 306 of the Act, and will be codified at 49 CFR part 37.

A public accommodation has obligations under this rule with respect to a cruise ship to the extent that its operations are subject to the laws of the United States.

The definition of "facility" only includes the site over which the private entity may exercise control or on which a place of public accommodation or a commercial facility is located. It does not include, for example, adjacent roads or walks controlled by a public entity that is not subject to this part. Public entities are subject to the requirements of title II of the Act. The Department's regulation implementing title II, which will be codified at 28 CFR part 35, addresses the obligations of public entities to ensure accessibility by providing curb ramps at pedestrian walkways.

"Individual with a disability" means a person who has a disability but does not include an individual who is currently illegally using drugs, when the public accommodation acts on the basis of such use. The phrase "current illegal use of drugs" is explained in the preamble to Sec.36.209.

"Place of public accommodation." The term "place of public accommodation" is an adaptation of the statutory definition of "public accommodation" in section 301(7) of the ADA and appears as an element of the regulatory definition of public accommodation. The final rule defines "place of public accommodation" as a facility, operated by a private entity, whose operations affect commerce and fall within at least one of 12 specified categories. The term "public accommodation," on the other hand, is reserved by the final rule for the private entity that owns, leases (or leases to), or operates a place of public accommodation. It is the public accommodation, and not the place of public accommodation, that is subject to the regulation's nondiscrimination requirements. Placing the obligation not to discriminate on the public accommodation, as defined in the

rule, is consistent with section 302(a) of the ADA, which places the obligation not to discriminate on any person who owns, leases (or leases to), or operates a place of public accommodation.

Facilities operated by government agencies or other public entities as defined in this section do not qualify as places of public accommodation. The actions of public entities are governed by title II of the ADA and will be subject to regulations issued by the Department of Justice under that title. The receipt of government assistance by a private entity does not by itself preclude a facility from being considered as a place of public accommodation.

The definition of place of public accommodation incorporates the 12 categories of facilities represented in the statutory definition of public accommodation in section 301(7) of the ADA:

1. Places of lodging.
2. Establishments serving food or drink.
3. Places of exhibition or entertainment.
4. Places of public gathering.
5. Sales or rental establishments.
6. Service establishments.
7. Stations used for specified public transportation.
8. Places of public display or collection.
9. Places of recreation.
10. Places of education.

11. Social service center establishments.

12. Places of exercise or recreation.

In order to be a place of public accommodation, a facility must be operated by a private entity, its operations must affect commerce, and it must fall within one of these 12 categories. While the list of categories is exhaustive, the representative examples of facilities within each category are not. Within each category only a few examples are given. The category of social service center establishments would include not only the types of establishments listed, day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies, but also establishments such as substance abuse treatment centers, rape crisis centers, and halfway houses. As another example, the category of sales or rental establishments would include an innumerable array of facilities that would sweep far beyond the few examples given in the regulation. For example, other retail or wholesale establishments selling or renting items, such as bookstores, videotape rental stores, car rental establishment, pet stores, and jewelry stores would also be covered under this category, even though they are not specifically listed.

Several commenters requested clarification as to the coverage of wholesale establishments under the category of "sales or rental establishments." The Department intends for wholesale establishments to be covered under this category as places of public accommodation except in cases where they sell exclusively to other businesses and not to individuals. For example, a company that grows food produce and supplies its crops exclusively to food processing corporations on a wholesale basis does not become a public accommodation because of these

transactions. If this company operates a road side stand where its crops are sold to the public, the road side stand would be a sales establishment covered by the ADA. Conversely, a sales establishment that markets its goods as "wholesale to the public" and sells to individuals would not be exempt from ADA coverage despite its use of the word "wholesale" as a marketing technique.

Of course, a company that operates a place of public accommodation is subject to this part only in the operation of that place of public accommodation. In the example given above, the wholesale produce company that operates a road side stand would be a public accommodation only for the purposes of the operation of that stand. The company would be prohibited from discriminating on the basis of disability in the operation of the road side stand, and it would be required to remove barriers to physical access to the extent that it is readily achievable to do so (see Sec.36.304); however, in the event that it is not readily achievable to remove barriers, for example, by replacing a gravel surface or regrading the area around the stand to permit access by persons with mobility impairments, the company could meet its obligations through alternative methods of making its goods available, such as delivering produce to a customer in his or her car (see Sec.36.305). The concepts of readily achievable barrier removal and alternatives to barrier removal are discussed further in the preamble discussion of Sec..36.304 and 36.305.

Even if a facility does not fall within one of the 12 categories, and therefore does not qualify as a place of public accommodation, it still may be a commercial facility as defined in Sec.36.104 and be subject to the new construction and alterations requirements of subpart D.

A number of commenters questioned the treatment of residential hotels and other residential facilities in the Department's proposed rule. These commenters were essentially seeking resolution of the relationship between the Fair Housing Act and the ADA concerning facilities that are both residential in nature and engage in activities that would cause them to be classified as "places of public accommodation" under the ADA. The ADA's express exemption relating to the Fair Housing Act applies only to "commercial facilities" and not to "places of public accommodation."

A facility whose operations affect interstate commerce is a place of public accommodation for purposes of the ADA to the extent that its operations include those types of activities engaged in or services provided by the facilities contained on the list of 12 categories in section 301(7) of the ADA. Thus, a facility that provides social services would be considered a "social service center establishment." Similarly, the category "places of lodging" would exclude solely residential facilities because the nature of a place of lodging contemplates the use of the facility for short-term stays.

Many facilities, however, are mixed use facilities. For example, in a large hotel that has a separate residential apartment wing, the residential wing would not be covered by the ADA because of the nature of the occupancy of that part of the facility. This residential wing would, however, be covered by the Fair Housing Act. The separate nonresidential accommodations in the rest of the hotel would be a place of lodging, and thus a public accommodation subject to the

requirements of this final rule. If a hotel allows both residential and short-term stays, but does not allocate space for these different uses in separate, discrete units, both the ADA and the Fair Housing Act may apply to the facility. Such determinations will need to be made on a case-by-case basis. Any place of lodging of the type described in paragraph (1) of the definition of place of public accommodation and that is an establishment located within a building that contains not more than five rooms for rent or hire and is actually occupied by the proprietor of the establishment as his or her residence is not covered by the ADA. (This exclusion from coverage does not apply to other categories of public accommodations, for example, professional offices or homeless shelters, that are located in a building that is also occupied as a private residence.)

A number of commenters noted that the term "residential hotel" may also apply to a type of hotel commonly known as a "single room occupancy hotel." Although such hotels or portions of such hotels may fall under the Fair Housing Act when operated or used as long-term residences, they are also considered "places of lodging" under the ADA when guests of such hotels are free to use them on a short-term basis. In addition, "single room occupancy hotels" may provide social services to their guests, often through the operation of Federal or State grant programs. In such a situation, the facility would be considered a "social service center establishment" and thus covered by the ADA as a place of public accommodation, regardless of the length of stay of the occupants.

A similar analysis would also be applied to other residential facilities that provide social services, including homeless

shelters, shelters for people seeking refuge from domestic violence, nursing homes, residential care facilities, and other facilities where persons may reside for varying lengths of time. Such facilities should be analyzed under the Fair Housing Act to determine the application of that statute. The ADA, however, requires a separate and independent analysis. For example, if the facility, or a portion of the facility, is intended for or permits short-term stays, or if it can appropriately be categorized as a service establishment or as a social service establishment, then the facility or that portion of the facility used for the covered purpose is a place of public accommodation under the ADA. For example, a homeless shelter that is intended and used only for long-term residential stays and that does not provide social services to its residents would not be covered as a place of public accommodation. However, if this facility permitted short-term stays or provided social services to its residents, it would be covered under the ADA either as a "place of lodging" or as a "social service center establishment," or as both.

A private home, by itself, does not fall within any of the 12 categories. However, it can be covered as a place of public accommodation to the extent that it is used as a facility that would fall within one of the 12 categories. For example, if a professional office of a dentist, doctor, or psychologist is located in a private home, the portion of the home dedicated to office use (including areas used both for the residence and the office, e.g., the entrance to the home that is also used as the entrance to the professional office) would be considered a place of public accommodation. Places of public accommodation located in residential facilities are specifically addressed in Sec.36.207.

If a tour of a commercial facility that is not otherwise a place of public accommodation, such as, for example, a factory or a movie studio production set, is open to the general public, the route followed by the tour is a place of public accommodation and the tour must be operated in accordance with the rule's requirements for public accommodations. The place of public accommodation defined by the tour does not include those portions of the commercial facility that are merely viewed from the tour route. Hence, the barrier removal requirements of Sec.36.304 only apply to the physical route followed by the tour participants and not to work stations or other areas that are merely adjacent to, or within view of, the tour route. If the tour is not open to the general public, but rather is conducted, for example, for selected business colleagues, partners, customers, or consultants, the tour route is not a place of public accommodation and the tour is not subject to the requirements for public accommodations.

Public accommodations that receive Federal financial assistance are subject to the requirements of section 504 of the Rehabilitation Act as well as the requirements of the ADA.

Private schools, including elementary and secondary schools, are covered by the rule as places of public accommodation. The rule itself, however, does not require a private school to provide a free appropriate education or develop an individualized education program in accordance with regulations of the Department of Education implementing section 504 of the Rehabilitation Act of 1973, as amended (34 CFR part 104), and regulations implementing the Individuals with Disabilities Education Act

(34 CFR part 300). The receipt of Federal assistance by a private school, however, would trigger application of the Department of Education's regulations to the extent mandated by the particular type of assistance received.

"Private club." The term "private club" is defined in accordance with section 307 of the ADA as a private club or establishment exempted from coverage under title II of the Civil Rights Act of 1964. Title II of the 1964 Act exempts any "private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of [a place of public accommodation as defined in title II]." The rule, therefore, as reflected in Sec.36.102(e) of the application section, limits the coverage of private clubs accordingly. The obligations of a private club that rents space to any other private entity for the operation of a place of public accommodation are discussed further in connection with Sec.36.201.

In determining whether a private entity qualifies as a private club under title II, courts have considered such factors as the degree of member control of club operations, the selectivity of the membership selection process, whether substantial membership fees are charged, whether the entity is operated on a nonprofit basis, the extent to which the facilities are open to the public, the degree of public funding, and whether the club was created specifically to avoid compliance with the Civil Rights Act. See e.g., Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973); Daniel v. Paul, 395 U.S. 298 (1969); Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2d Cir. 1974); Anderson v. Pass Christian Isles Golf Club, Inc., 488 F.2d 855 (5th Cir. 1974); Smith v.

YMCA, 462 F.2d 634 (5th Cir. 1972); Stout v. YMCA, 404 F.2d 687 (5th Cir. 1968); United States v. Richberg, 398 F.2d 523 (5th Cir. 1968); Nesmith v. YMCA, 397 F.2d 96 (4th Cir. 1968); United States v. Lansdowne Swim Club, 713 F. Supp. 785 (E.D. Pa. 1989); Durham v. Red Lake Fishing and Hunting Club, Inc., 666 F. Supp. 954 (W.D. Tex. 1987); New York v. Ocean Club, Inc., 602 F. Supp. 489 (E.D.N.Y. 1984); Brown v. Loudoun Golf and Country Club, Inc., 573 F. Supp. 399 (E.D. Va. 1983); United States v. Trustees of Fraternal Order of Eagles, 472 F. Supp. 1174 (E.D. Wis. 1979); Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182 (D. Conn. 1974).

"Private entity." The term "private entity" is defined as any individual or entity other than a public entity. It is used as part of the definition of "public accommodation" in this section.

The definition adds "individual" to the statutory definition of private entity (see section 301(6) of the ADA). This addition clarifies that an individual may be a private entity and, therefore, may be considered a public accommodation if he or she owns, leases (or leases to), or operates a place of public accommodation. The explicit inclusion of individuals under the definition of private entity is consistent with section 302(a) of the ADA, which broadly prohibits discrimination on the basis of disability by any person who owns, leases (or leases to), or operates a place of public accommodation.

"Public accommodation." The term "public accommodation" means a private entity that owns, leases (or leases to), or

operates a place of public accommodation. The regulatory term, "public accommodation," corresponds to the statutory term, "person," in section 302(a) of the ADA. The ADA prohibits discrimination "by any person who owns, leases (or leases to), or operates a place of public accommodation." The text of the regulation consequently places the ADA's nondiscrimination obligations on "public accommodations" rather than on "persons" or on "places of public accommodation."

As stated in Sec.36.102(b)(2), the requirements of subparts B and C obligate a public accommodation only with respect to the operations of a place of public accommodation. A public accommodation must also meet the requirements of subpart D with respect to facilities used as, or designed or constructed for use as, places of public accommodation or commercial facilities.

"Public entity." The term "public entity" is defined in accordance with section 201(1) of the ADA as any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; and the National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act). It is used in the definition of "private entity" in Sec.36.104. Public entities are excluded from the definition of private entity and therefore cannot qualify as public accommodations under this regulation. However, the actions of public entities are covered by title II of the ADA and by the Department's title II regulations codified at 28 CFR part 35.

"Readily achievable." The definition of "readily achievable" follows the statutory definition of that term in section 301(9) of the ADA. Readily achievable means easily accomplishable and able to be carried out without much difficulty or expense. The term is used as a limitation on the obligation to remove barriers under Sec..36.304(a), 36.305(a), 36.308(a), and 36.310(b). Further discussion of the meaning and application of the term "readily achievable" may be found in the preamble section for Sec.36.304.

The definition lists factors to be considered in determining whether barrier removal is readily achievable in any particular circumstance. A significant number of commenters objected to Sec.36.306 of the proposed rule, which listed identical factors to be considered for determining "readily achievable" and "undue burden" together in one section. They asserted that providing a consolidated section blurred the distinction between the level of effort required by a public accommodation under the two standards. The readily achievable standard is a "lower" standard than the "undue burden" standard in terms of the level of effort required, but the factors used in determining whether an action is readily achievable or would result in an undue burden are identical (See Education and Labor report at 109). Although the preamble to the proposed rule clearly delineated the relationship between the two standards, to eliminate any confusion the Department has deleted Sec.36.306 of the proposed rule. That section, in any event, as other commenters noted, had merely repeated the lists of factors contained in the definitions of readily achievable and undue burden.

The list of factors included in the definition is derived from section 301(9) of the ADA. It reflects the congressional

intention that a wide range of factors be considered in determining whether an action is readily achievable. It also takes into account that many local facilities are owned or operated by parent corporations or entities that conduct operations at many different sites. This section makes clear that, in some instances, resources beyond those of the local facility where the barrier must be removed may be relevant in determining whether an action is readily achievable. One must also evaluate the degree to which any parent entity has resources that may be allocated to the local facility.

The statutory list of factors in section 301(9) of the Act uses the term "covered entity" to refer to the larger entity of which a particular facility may be a part. "Covered entity" is not a defined term in the ADA and is not used consistently throughout the Act. The definition, therefore, substitutes the term "parent entity" in place of "covered entity" in paragraphs (3), (4), and (5) when referring to the larger private entity whose overall resources may be taken into account. This usage is consistent with the House Judiciary Committee's use of the term "parent company" to describe the larger entity of which the local facility is a part (H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3, at 40 - 41, 54 - 55 (1990) (hereinafter "Judiciary report")).

A number of commenters asked for more specific guidance as to when and how the resources of a parent corporation or entity are to be taken into account in determining what is readily achievable. The Department believes that this complex issue is most appropriately resolved on a case-by-case basis. As the comments reflect, there is a wide variety of possible relationships between the site in question and any parent corporation or other entity. It would be

unwise to posit legal ramifications under the ADA of even generic relationships (e.g., banks involved in foreclosures or insurance companies operating as trustees or in other similar fiduciary relationships), because any analysis will depend so completely on the detailed fact situations and the exact nature of the legal relationships involved. The final rule does, however, reorder the factors to be considered. This shift and the addition of the phrase "if applicable" make clear that the line of inquiry concerning factors will start at the site involved in the action itself. This change emphasizes that the overall resources, size, and operations of the parent corporation or entity should be considered to the extent appropriate in light of "the geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity."

Although some commenters sought more specific numerical guidance on the definition of readily achievable, the Department has declined to establish in the final rule any kind of numerical formula for determining whether an action is readily achievable. It would be difficult to devise a specific ceiling on compliance costs that would take into account the vast diversity of enterprises covered by the ADA's public accommodations requirements and the economic situation that any particular entity would find itself in at any moment. The final rule, therefore, implements the flexible case-by-case approach chosen by Congress.

A number of commenters requested that security considerations be explicitly recognized as a factor in determining whether a barrier removal action is readily achievable. The Department believes that legitimate safety requirements, including crime prevention measures, may be

taken into account so long as they are based on actual risks and are necessary for safe operation of the public accommodation. This point has been included in the definition.

Some commenters urged the Department not to consider acts of barrier removal in complete isolation from each other in determining whether they are readily achievable. The Department believes that it is appropriate to consider the cost of other barrier removal actions as one factor in determining whether a measure is readily achievable.

"Service animal." The term "service animal" encompasses any guide dog, signal dog, or other animal individually trained to provide assistance to an individual with a disability. The term is used in Sec.36.302(c), which requires public accommodations generally to modify policies, practices, and procedures to accommodate the use of service animals in places of public accommodation.

"Specified public transportation." The definition of "specified public transportation" is identical to the statutory definition in section 301(10) of the ADA. The term means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis. It is used in category (7) of the definition of "place of public accommodation," which includes stations used for specified public transportation.

The effect of this definition, which excludes transportation by aircraft, is that it excludes privately operated airports from coverage as places of public accommodation. However, places of public accommodation located within airports would be covered by this part. Airports that are operated by public entities are covered by title II of the ADA and, if they are operated as part of a program receiving Federal financial assistance, by section 504 of the Rehabilitation Act. Privately operated airports are similarly covered by section 504 if they are operated as part of a program receiving Federal financial assistance. The operations of any portion of any airport that are under the control of an air carrier are covered by the Air Carrier Access Act. In addition, airports are covered as commercial facilities under this rule.

"State." The definition of "State" is identical to the statutory definition in section 3(3) of the ADA. The term is used in the definitions of "commerce" and "public entity" in Sec.36.104.

"Undue burden." The definition of "undue burden" is analogous to the statutory definition of "undue hardship" in employment under section 101(10) of the ADA. The term undue burden means "significant difficulty or expense" and serves as a limitation on the obligation to provide auxiliary aids and services under Sec.36.303 and Sec..36.309 (b)(3) and (c)(3). Further discussion of the meaning and application of the term undue burden may be found in the preamble discussion of Sec.36.303.

The definition lists factors considered in determining whether provision of an auxiliary aid or service in any

particular circumstance would result in an undue burden. The factors to be considered in determining whether an action would result in an undue burden are identical to those to be considered in determining whether an action is readily achievable. However, "readily achievable" is a lower standard than "undue burden" in that it requires a lower level of effort on the part of the public accommodation (see Education and Labor report at 109).

Further analysis of the factors to be considered in determining undue burden may be found in the preamble discussion of the definition of the term "readily achievable."

Subpart B -- General Requirements

Subpart B includes general prohibitions restricting a public accommodation from discriminating against people with disabilities by denying them the opportunity to benefit from goods or services, by giving them unequal goods or services, or by giving them different or separate goods or services. These general prohibitions are patterned after the basic, general prohibitions that exist in other civil rights laws that prohibit discrimination on the basis of race, sex, color, religion, or national origin.

Section 36.201 General

Section 36.201(a) contains the general rule that prohibits discrimination on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation.

Full and equal enjoyment means the right to participate and to have an equal opportunity to obtain the same results as others to the extent possible with such accommodations as may be required by the Act and these regulations. It does not mean that an individual with a disability must achieve an identical result or level of achievement as persons without a disability. For example, an exercise class cannot exclude a person who uses a wheelchair because he or she cannot do all of the exercises and derive the same result from the class as persons without a disability.

Section 302(a) of the ADA states that the prohibition against discrimination applies to "any person who owns, leases (or leases to), or operates a place of public accommodation," and this language is reflected in Sec.36.201(a). The coverage is quite extensive and would include sublessees, management companies, and any other entity that owns, leases, leases to, or operates a place of public accommodation, even if the operation is only for a short time.

The first sentence of paragraph (b) of Sec.36.201 reiterates the general principle that both the landlord that owns the building that houses the place of public accommodation, as well as the tenant that owns or operates the place of public accommodation, are public accommodations subject to the requirements of this part. Although the statutory language could be interpreted as placing equal responsibility on all private entities, whether lessor, lessee, or operator of a public accommodation, the committee reports suggest that liability may be allocated. Section 36.201(b) of that section of the proposed rule attempted to allocate liability in the

regulation itself. Paragraph (b)(2) of that section made a specific allocation of liability for the obligation to take readily achievable measures to remove barriers, and paragraph (b)(3) made a specific allocation for the obligation to provide auxiliary aids.

Numerous commenters pointed out that these allocations would not apply in all situations. Some asserted that paragraph (b)(2) of the proposed rule only addressed the situation when a lease gave the tenant the right to make alterations with permission of the landlord, but failed to address other types of leases, e.g., those that are silent on the right to make alterations, or those in which the landlord is not permitted to enter a tenant's premises to make alterations. Several commenters noted that many leases contain other clauses more relevant to the ADA than the alterations clause. For example, many leases contain a "compliance clause," a clause which allocates responsibility to a particular party for compliance with all relevant Federal, State, and local laws. Many commenters pointed out various types of relationships that were left unaddressed by the regulation, e.g., sale and leaseback arrangements where the landlord is a financial institution with no control or responsibility for the building; franchises; subleases; and management companies which, at least in the hotel industry, often have control over operations but are unable to make modifications to the premises.

Some commenters raised specific questions as to how the barrier removal allocation would work as a practical matter. Paragraph (b)(2) of the proposed rule provided that the burden of making readily achievable modifications within the tenant's place of public accommodation would shift to

the landlord when the modifications were not readily achievable for the tenant or when the landlord denied a tenant's request for permission to make such modifications. Commenters noted that the rule did not specify exactly when the burden would actually shift from tenant to landlord and whether the landlord would have to accept a tenant's word that a particular action is not readily achievable. Others questioned if the tenant should be obligated to use alternative methods of barrier removal before the burden shifts. In light of the fact that readily achievable removal of barriers can include such actions as moving of racks and displays, some commenters doubted the appropriateness of requiring a landlord to become involved in day-to-day operations of its tenants' businesses.

The Department received widely differing comments in response to the preamble question asking whether landlord and tenant obligations should vary depending on the length of time remaining on an existing lease. Many suggested that tenants should have no responsibilities in "shorter leases," which commenters defined as ranging anywhere from 90 days to three years. Other commenters pointed out that the time remaining on the lease should not be a factor in the rule's allocation of responsibilities, but is relevant in determining what is readily achievable for the tenant. The Department agrees with this latter approach and will interpret the rule in that manner.

In recognition of the somewhat limited applicability of the allocation scheme contained in the proposed rule, paragraphs (b)(2) and (b)(3) have been deleted from the final rule. The Department has substituted instead a statement that allocation of responsibility as between the parties for

taking readily achievable measures to remove barriers and to provide auxiliary aids and services both in common areas and within places of public accommodation may be determined by the lease or other contractual relationships between the parties. The ADA was not intended to change existing landlord/tenant responsibilities as set forth in the lease. By deleting specific provisions from the rule, the Department gives full recognition to this principle. As between the landlord and tenant, the extent of responsibility for particular obligations may be, and in many cases probably will be, determined by contract.

The suggested allocation of responsibilities contained in the proposed rule may be used if appropriate in a particular situation. Thus, the landlord would generally be held responsible for making readily achievable changes and providing auxiliary aids and services in common areas and for modifying policies, practices, or procedures applicable to all tenants, and the tenant would generally be responsible for readily achievable changes, provision of auxiliary aids, and modification of policies within its own place of public accommodation.

Many commenters objected to the proposed rule's allocation of responsibility for providing auxiliary aids and services solely to the tenant, pointing out that this exclusive allocation may not be appropriate in the case of larger public accommodations that operate their businesses by renting space out to smaller public accommodations. For example, large theaters often rent to smaller traveling companies and hospitals often rely on independent contractors to provide childbirth classes. Groups representing persons with disabilities objected to the proposed rule because, in their

view, it permitted the large theater or hospital to evade ADA responsibilities by leasing to independent smaller entities. They suggested that these types of public accommodations are not really landlords because they are in the business of providing a service, rather than renting space, as in the case of a shopping center or office building landlord. These commenters believed that responsibility for providing auxiliary aids should shift to the landlord, if the landlord relies on a smaller public accommodation or independent contractor to provide services closely related to those of the larger public accommodation, and if the needed auxiliary aids prove to be an undue burden for the smaller public accommodation. The final rule no longer lists specific allocations to specific parties but, rather, leaves allocation of responsibilities to the lease negotiations. Parties are, therefore, free to allocate the responsibility for auxiliary aids.

Section 36.201(b)(4) of the proposed rule, which provided that alterations by a tenant on its own premises do not trigger a path of travel obligation on the landlord, has been moved to Sec.36.403(d) of the final rule.

An entity that is not in and of itself a public accommodation, such as a trade association or performing artist, may become a public accommodation when it leases space for a conference or performance at a hotel, convention center, or stadium. For an entity to become a public accommodation when it is the lessee of space, however, the Department believes that consideration in some form must be given. Thus, a Boy Scout troop that accepts donated space does not become a public accommodation because the troop has not "leased" space, as required by the ADA.

As a public accommodation, the trade association or performing artist will be responsible for compliance with this part. Specific responsibilities should be allocated by contract, but, generally, the lessee should be responsible for providing auxiliary aids and services (which could include interpreters, Braille programs, etc.) for the participants in its conference or performance as well as for assuring that displays are accessible to individuals with disabilities.

Some commenters suggested that the rule should allocate responsibilities for areas other than removal of barriers and auxiliary aids. The final rule leaves allocation of all areas to the lease negotiations. However, in general landlords should not be given responsibility for policies a tenant applies in operating its business, if such policies are solely those of the tenant. Thus, if a restaurant tenant discriminates by refusing to seat a patron, it would be the tenant, and not the landlord, who would be responsible, because the discriminatory policy is imposed solely by the tenant and not by the landlord. If, however, a tenant refuses to modify a "no pets" rule to allow service animals in its restaurant because the landlord mandates such a rule, then both the landlord and the tenant would be liable for violation of the ADA when a person with a service dog is refused entrance. The Department wishes to emphasize, however, that the parties are free to allocate responsibilities in any way they choose.

Private clubs are also exempt from the ADA. However, consistent with title II of the Civil Rights Act (42 U.S.C. 2000a(e), a private club is considered a public accommodation to the extent that "the facilities of such establishment are made available to the customers or patrons" of a place of public accommodation. Thus, if a

private club runs a day care center that is open exclusively to its own members, the club, like the church in the example above, would have no responsibility for compliance with the ADA. Nor would the day care center have any responsibilities because it is part of the private club exempt from the ADA.

On the other hand, if the private club rents to a day care center that is open to the public, then the private club would have the same obligations as any other public accommodation that functions as a landlord with respect to compliance with title III within the day care center. In such a situation, both the private club that "leases to" a public accommodation and the public accommodation lessee (the day care center) would be subject to the ADA. This same principle would apply if the private club were to rent to, for example, a bar association, which is not generally a public accommodation but which, as explained above, becomes a public accommodation when it leases space for a conference.

Section 36.202 Activities

Section 36.202 sets out the general forms of discrimination prohibited by title III of the ADA. These general prohibitions are further refined by the specific prohibitions in subpart C. Section 36.213 makes clear that the limitations on the ADA's requirements contained in subpart C, such as "necessity" (Sec.36.301(a)) and "safety" (Sec.36.301(b)), are applicable to the prohibitions in Sec.36.202. Thus, it is unnecessary to add these limitations to Sec.36.202 as has been requested by some commenters. In addition, the language of Sec.36.202 very closely tracks the language of section 302(b)(1)(A) of the Act, and that statutory provision

does not expressly contain these limitations.

Deny participation -- Section 36.202(a) provides that it is discriminatory to deny a person with a disability the right to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

A public accommodation may not exclude persons with disabilities on the basis of disability for reasons other than those specifically set forth in this part. For example, a public accommodation cannot refuse to serve a person with a disability because its insurance company conditions coverage or rates on the absence of persons with disabilities. This is a frequent basis of exclusion from a variety of community activities and is prohibited by this part.

Unequal benefit -- Section 36.202(b) prohibits services or accommodations that are not equal to those provided others. For example, persons with disabilities must not be limited to certain performances at a theater.

Separate benefit -- Section 36.202(c) permits different or separate benefits or services only when necessary to provide persons with disabilities opportunities as effective as those provided others. This paragraph permitting separate benefits "when necessary" should be read together with Sec.36.203(a), which requires integration in "the most integrated setting appropriate to the needs of the individual." The preamble to that section provides further guidance on separate programs. Thus, this section would not prohibit the designation of parking spaces for persons with disabilities.

Each of the three paragraphs (a) - (c) prohibits discrimination against an individual or class of individuals "either directly or through contractual, licensing, or other arrangements." The intent of the contractual prohibitions of these paragraphs is to prohibit a public accommodation from doing indirectly, through a contractual relationship, what it may not do directly. Thus, the "individual or class of individuals" referenced in the three paragraphs is intended to refer to the clients and customers of the public accommodation that entered into a contractual arrangement. It is not intended to encompass the clients or customers of other entities. A public accommodation, therefore, is not liable under this provision for discrimination that may be practiced by those with whom it has a contractual relationship, when that discrimination is not directed against its own clients or customers. For example, if an amusement park contracts with a food service company to operate its restaurants at the park, the amusement park is not responsible for other operations of the food service company that do not involve clients or customers of the amusement park. Section 36.202(d) makes this clear by providing that the term "individual or class of individuals" refers to the clients or customers of the public accommodation that enters into the contractual, licensing, or other arrangement.

Section 36.203 Integrated Settings

Section 36.203 addresses the integration of persons with disabilities. The ADA recognizes that the provision of goods and services in an integrated manner is a fundamental tenet of nondiscrimination on the basis of disability. Providing segregated accommodations and services relegates persons

with disabilities to the status of second-class citizens. For example, it would be a violation of this provision to require persons with mental disabilities to eat in the back room of a restaurant or to refuse to allow a person with a disability the full use of a health spa because of stereotypes about the person's ability to participate. Section 36.203(a) states that a public accommodation shall afford goods, services, facilities, privileges, advantages, and accommodations to an individual with a disability in the most integrated setting appropriate to the needs of the individual. Section 36.203(b) specifies that, notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different. Section 306.203(c), which is derived from section 501(d) of the Americans with Disabilities Act, states that nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit that he or she chooses not to accept.

Taken together, these provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public accommodations are required to make decisions based on facts applicable to individuals and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do.

Sections 36.203 (b) and (c) make clear that individuals with disabilities cannot be denied the opportunity to participate in

programs that are not separate or different. This is an important and overarching principle of the Americans with Disabilities Act. Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities.

For example, a person who is blind may wish to decline participating in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibit at his or her own pace with the museum's recorded tour. It is not the intent of this section to require the person who is blind to avail himself or herself of the special tour. Modified participation for persons with disabilities must be a choice, not a requirement.

Further, it would not be a violation of this section for an establishment to offer recreational programs specially designed for children with mobility impairments in those limited circumstances. However, it would be a violation of this section if the entity then excluded these children from other recreational services made available to nondisabled children, or required children with disabilities to attend only designated programs.

Many commenters asked that the Department clarify a public accommodation's obligations within the integrated program when it offers a separate program, but an individual with a disability chooses not to participate in the separate program. It is impossible to make a blanket statement as to what level of auxiliary aids or modifications are required in the integrated program. Rather, each situation must be assessed individually. Assuming the

integrated program would be appropriate for a particular individual, the extent to which that individual must be provided with modifications will depend not only on what the individual needs but also on the limitations set forth in subpart C. For example, it may constitute an undue burden for a particular public accommodation, which provides a full-time interpreter in its special guided tour for individuals with hearing impairments, to hire an additional interpreter for those individuals who choose to attend the integrated program. The Department cannot identify categorically the level of assistance or aid required in the integrated program.

The preamble to the proposed rule contained a statement that some interpreted as encouraging the continuation of separate schools, sheltered workshops, special recreational programs, and other similar programs. It is important to emphasize that Sec.36.202(c) only calls for separate programs when such programs are "necessary" to provide as effective an opportunity to individuals with disabilities as to other individuals. Likewise, Sec.36.203(a) only permits separate programs when a more integrated setting would not be "appropriate." Separate programs are permitted, then, in only limited circumstances. The sentence at issue has been deleted from the preamble because it was too broadly stated and had been erroneously interpreted as Departmental encouragement of separate programs without qualification.

The proposed rule's reference in Sec.36.203(b) to separate programs or activities provided in accordance with "this section" has been changed to "this subpart" in recognition of the fact that separate programs or activities may, in some limited circumstances, be permitted not only by Sec.36.203(a) but also by Sec.36.202(c).

In addition, some commenters suggested that the individual with the disability is the only one who can decide whether a setting is "appropriate" and what the "needs" are. Others suggested that only the public accommodation can make these determinations. The regulation does not give exclusive responsibility to either party. Rather, the determinations are to be made based on an objective view, presumably one which would take into account views of both parties.

Some commenters expressed concern that Sec.36.203(c), which states that nothing in the rule requires an individual with a disability to accept special accommodations and services provided under the ADA, could be interpreted to allow guardians of infants or older people with disabilities to refuse medical treatment for their wards. Section 36.203(c) has been revised to make it clear that paragraph (c) is inapplicable to the concern of the commenters. A new paragraph (c)(2) has been added stating that nothing in the regulation authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual. New paragraph (c) clarifies that neither the ADA nor the regulation alters current Federal law ensuring the rights of incompetent individuals with disabilities to receive food, water, and medical treatment. See, e.g., Child Abuse Amendments of 1984 (42 U.S.C. 5106a(b)(10), 5106g(10)); Rehabilitation Act of 1973, as amended (29 U.S.C 794); Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. 6042).

Sections 36.203(c) (1) and (2) are based on section 501(d) of the ADA. Section Sec.501(d) was designed to clarify that

nothing in the ADA requires individuals with disabilities to accept special accommodations and services for individuals with disabilities that may segregate them:

The Committee added this section (501(d)) to clarify that nothing in the ADA is intended to permit discriminatory treatment on the basis of disability, even when such treatment is rendered under the guise of providing an accommodation, service, aid or benefit to the individual with disability. For example, a blind individual may choose not to avail himself or herself of the right to go to the front of a line, even if a particular public accommodation has chosen to offer such a modification of a policy for blind individuals. Or, a blind individual may choose to decline to participate in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibits at his or her own pace with the museum's recorded tour.

(Judiciary report at 71 - 72.) The Act is not to be construed to mean that an individual with disabilities must accept special accommodations and services for individuals with disabilities when that individual chooses to participate in the regular services already offered. Because medical treatment, including treatment for particular conditions, is not a special accommodation or service for individuals with disabilities under section 501(d), neither the Act nor this part provides affirmative authority to suspend such treatment. Section 501(d) is intended to clarify that the Act is not designed to foster discrimination through mandatory acceptance of special services when other alternatives are provided; this concern does not reach to the provision of medical treatment for the disabling condition itself.

Section 36.213 makes clear that the limitations contained in subpart C are to be read into subpart B. Thus, the integration requirement is subject to the various defenses contained in subpart C, such as safety, if eligibility criteria are at issue (Sec.36.301(b)), or fundamental alteration and undue burden, if the concern is provision of auxiliary aids (Sec.36.303(a)).

Section 36.204 Administrative Methods

Section 36.204 specifies that an individual or entity shall not, directly, or through contractual or other arrangements, utilize standards or criteria or methods of administration that have the effect of discriminating on the basis of disability or that perpetuate the discrimination of others who are subject to common administrative control. The preamble discussion of Sec.36.301 addresses eligibility criteria in detail.

Section 36.204 is derived from section 302(b)(1)(D) of the Americans with Disabilities Act, and it uses the same language used in the employment section of the ADA (section 102(b)(3)). Both sections incorporate a disparate impact standard to ensure the effectiveness of the legislative mandate to end discrimination. This standard is consistent with the interpretation of section 504 by the U.S. Supreme Court in Alexander v. Choate, 469 U.S. 287 (1985). The Court in Choate explained that members of Congress made numerous statements during passage of section 504 regarding eliminating architectural barriers, providing access to transportation, and eliminating discriminatory effects of job qualification procedures. The Court then noted: "These statements would ring hollow if the resulting legislation

could not rectify the harms resulting from action that discriminated by effect as well as by design." Id at 297 (footnote omitted).

Of course, Sec.36.204 is subject to the various limitations contained in subpart C including, for example, necessity (Sec.36.301(a)), safety (Sec.36.301(b)), fundamental alteration (Sec.36.302(a)), readily achievable (Sec.36.304(a)), and undue burden (Sec.36.303(a)).

Section 36.205 Association

Section 36.205 implements section 302(b)(1)(E) of the Act, which provides that a public accommodation shall not exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association. This section is unchanged from the proposed rule.

The individuals covered under this section include any individuals who are discriminated against because of their known association with an individual with a disability. For example, it would be a violation of this part for a day care center to refuse admission to a child because his or her brother has HIV disease.

This protection is not limited to those who have a familial relationship with the individual who has a disability. If a place of public accommodation refuses admission to a person with cerebral palsy and his or her companions, the

companions have an independent right of action under the ADA and this section.

During the legislative process, the term "entity" was added to section 302(b)(1)(E) to clarify that the scope of the provision is intended to encompass not only persons who have a known association with a person with a disability, but also entities that provide services to or are otherwise associated with such individuals. This provision was intended to ensure that entities such as health care providers, employees of social service agencies, and others who provide professional services to persons with disabilities are not subjected to discrimination because of their professional association with persons with disabilities. For example, it would be a violation of this section to terminate the lease of a entity operating an independent living center for persons with disabilities, or to seek to evict a health care provider because that individual or entity provides services to persons with mental impairments.

Section 36.206 Retaliation or Coercion

Section 36.206 implements section 503 of the ADA, which prohibits retaliation against any individual who exercises his or her rights under the Act. This section is unchanged from the proposed rule. Paragraph (a) of Sec.36.206 provides that no private entity or public entity shall discriminate against any individual because that individual has exercised his or her right to oppose any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

Paragraph (b) provides that no private entity or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise of his or her rights under this part or because that individual aided or encouraged any other individual in the exercise or enjoyment of any right granted or protected by the Act or this part.

Illustrations of practices prohibited by this section are contained in paragraph (c), which is modeled on a similar provision in the regulations issued by the Department of Housing and Urban Development to implement the Fair Housing Act (see 24 CFR 100.400(c)(l)). Prohibited actions may include:

(1) Coercing an individual to deny or limit the benefits, services, or advantages to which he or she is entitled under the Act or this part;

(2) Threatening, intimidating, or interfering with an individual who is seeking to obtain or use the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation;

(3) Intimidating or threatening any person because that person is assisting or encouraging an individual or group entitled to claim the rights granted or protected by the Act or this part to exercise those rights; or

(4) Retaliating against any person because that person has participated in any investigation or action to enforce the Act or this part.

This section protects not only individuals who allege a violation of the Act or this part, but also any individuals who support or assist them. This section applies to all investigations or proceedings initiated under the Act or this

part without regard to the ultimate resolution of the underlying allegations. Because this section prohibits any act of retaliation or coercion in response to an individual's effort to exercise rights established by the Act and this part (or to support the efforts of another individual), the section applies not only to public accommodations that are otherwise subject to this part, but also to individuals other than public accommodations or to public entities. For example, it would be a violation of the Act and this part for a private individual, e.g., a restaurant customer, to harass or intimidate an individual with a disability in an effort to prevent that individual from patronizing the restaurant. It would, likewise, be a violation of the Act and this part for a public entity to take adverse action against an employee who appeared as a witness on behalf of an individual who sought to enforce the Act.

Section 36.211 Maintenance of Accessible Features

Section 36.211 provides that a public accommodation shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part. The Act requires that, to the maximum extent feasible, facilities must be accessible to, and usable by, individuals with disabilities. This section recognizes that it is not sufficient to provide features such as accessible routes, elevators, or ramps, if those features are not maintained in a manner that enables individuals with disabilities to use them. Inoperable elevators, locked accessible doors, or

"accessible" routes that are obstructed by furniture, filing cabinets, or potted plants are neither "accessible to" nor "usable by" individuals with disabilities.

Some commenters objected that this section appeared to establish an absolute requirement and suggested that language from the preamble be included in the text of the regulation. It is, of course, impossible to guarantee that mechanical devices will never fail to operate. Paragraph (b) of the final regulation provides that this section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs. This paragraph is intended to clarify that temporary obstructions or isolated instances of mechanical failure would not be considered violations of the Act or this part. However, allowing obstructions or "out of service" equipment to persist beyond a reasonable period of time would violate this part, as would repeated mechanical failures due to improper or inadequate maintenance. Failure of the public accommodation to ensure that accessible routes are properly maintained and free of obstructions, or failure to arrange prompt repair of inoperable elevators or other equipment intended to provide access, would also violate this part.

Other commenters requested that this section be expanded to include specific requirements for inspection and maintenance of equipment, for training staff in the proper operation of equipment, and for maintenance of specific items. The Department believes that this section properly establishes the general requirement for maintaining access and that further, more detailed requirements are not necessary.

Section 36.213 Relationship of Subpart 8 to Subparts C and D

This section explains that subpart B sets forth the general principles of nondiscrimination applicable to all entities subject to this regulation, while subparts C and D provide guidance on the application of this part to specific situations. The specific provisions in subparts C and D, including the limitations on those provisions, control over the general provisions in circumstances where both specific and general provisions apply. Resort to the general provisions of subpart B is only appropriate where there are no applicable specific rules of guidance in subparts C or D. This interaction between the specific requirements and the general requirements operates with regard to contractual obligations as well.

One illustration of this principle is its application to the obligation of a public accommodation to provide access to services by removal of architectural barriers or by alternatives to barrier removal. The general requirement, established in subpart B by Sec.36.203, is that a public accommodation must provide its services to individuals with disabilities in the most integrated setting appropriate. This general requirement would appear to categorically prohibit "segregated" seating for persons in wheelchairs. Section 36.304, however, only requires removal of architectural barriers to the extent that removal is "readily achievable." If providing access to all areas of a restaurant, for example, would not be "readily achievable," a public accommodation may provide access to selected areas only. Also, Sec.36.305 provides that, where barrier removal is not readily achievable, a public accommodation may use alternative, readily achievable methods of making services available, such as curbside service or home delivery. Thus, in this

manner, the specific requirements of Sec..36.304 and 36.305 control over the general requirement of Sec.36.203.

Subpart C -- Specific Requirements

In general, subpart C implements the "specific prohibitions" that comprise section 302(b)(2) of the ADA. It also addresses the requirements of section 309 of the ADA regarding examinations and courses.

Section 36.301 Eligibility Criteria

Section 36.301 of the rule prohibits the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, and accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered. This prohibition is based on section 302(b)(2)(A)(i) of the ADA.

It would violate this section to establish exclusive or segregative eligibility criteria that would bar, for example, all persons who are deaf from playing on a golf course or all individuals with cerebral palsy from attending a movie theater, or limit the seating of individuals with Down's syndrome to only particular areas of a restaurant. The wishes, tastes, or preferences of other customers may not be asserted to justify criteria that would exclude or segregate individuals with disabilities.

Section 36.301 also prohibits attempts by a public accommodation to unnecessarily identify the existence of a disability; for example, it would be a violation of this section for a retail store to require an individual to state on a credit application whether the applicant has epilepsy, mental illness, or any other disability, or to inquire unnecessarily whether an individual has HIV disease.

Section 36.301 also prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others. For example, public accommodations may not require that an individual with a disability be accompanied by an attendant. As provided by Sec.36.306, however, a public accommodation is not required to provide services of a personal nature including assistance in toileting, eating, or dressing.

Paragraph (c) of Sec.36.301 provides that public accommodations may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids and services, barrier removal, alternatives to barrier removal, and reasonable modifications in policies, practices, and procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

Other commenters sought clarification as to whether Sec.36.301(c) prohibits professionals from charging for the additional time that it may take in certain cases to provide services to an individual with disabilities. The Department

does not intend Sec.36.301(c) to prohibit professionals who bill on the basis of time from charging individuals with disabilities on that basis. However, fees may not be charged for the provision of auxiliary aids and services, barrier removal, alternatives to barrier removal, reasonable modifications in policies, practices, and procedures, or any other measures necessary to ensure compliance with the ADA.

Other commenters inquired as to whether day care centers may charge for extra services provided to individuals with disabilities. As stated above, Sec.36.302(c) is intended only to prohibit charges for measures necessary to achieve compliance with the ADA.

Another commenter asserted that charges may be assessed for home delivery provided as an alternative to barrier removal under Sec.36.305, when home delivery is provided to all customers for a fee. Charges for home delivery are permissible if home delivery is not considered an alternative to barrier removal. If the public accommodation offers an alternative, such as curb, carry-out, or sidewalk service for which no surcharge is assessed, then it may charge for home delivery in accordance with its standard pricing for home delivery.

In addition, Sec.36.301 prohibits the imposition of criteria that "tend to" screen out an individual with a disability. This concept, which is derived from current regulations under section 504 (see, e.g., 45 CFR 84.13), makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, indirectly prevent or limit their ability to participate. For

example, requiring presentation of a driver's license as the sole means of identification for purposes of paying by check would violate this section in situations where, for example, individuals with severe vision impairments or developmental disabilities or epilepsy are ineligible to receive a driver's license and the use of an alternative means of identification, such as another photo I.D. or credit card, is feasible.

A public accommodation may, however, impose neutral rules and criteria that screen out, or tend to screen out, individuals with disabilities, if the criteria are necessary for the safe operation of the public accommodation. Examples of safety qualifications that would be justifiable in appropriate circumstances would include height requirements for certain amusement park rides or a requirement that all participants in a recreational rafting expedition be able to meet a necessary level of swimming proficiency. Safety requirements must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities.

Section 36.302 Modifications in Policies, Practices, or Procedures

Section 36.302 of the rule prohibits the failure to make reasonable modifications in policies, practices, and procedures when such modifications may be necessary to afford any goods, services, facilities, privileges, advantages, or accommodations, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges,

advantages, or accommodations. This prohibition is based on section 302(b)(2)(A)(ii) of the ADA.

For example, a parking facility would be required to modify a rule barring all vans or all vans with raised roofs, if an individual who uses a wheelchair-accessible van wishes to park in that facility, and if overhead structures are high enough to accommodate the height of the van. A department store may need to modify a policy of only permitting one person at a time in a dressing room, if an individual with mental retardation needs and requests assistance in dressing from a companion. Public accommodations may need to revise operational policies to ensure that services are available to individuals with disabilities. For instance, a hotel may need to adopt a policy of keeping an accessible room unoccupied until an individual with a disability arrives at the hotel, assuming the individual has properly reserved the room.

One example of application of this principle is specifically included in a new Sec.36.302(d) on check-out aisles. That paragraph provides that a store with check-out aisles must ensure that an adequate number of accessible check-out aisles is kept open during store hours, or must otherwise modify its policies and practices, in order to ensure that an equivalent level of convenient service is provided to individuals with disabilities as is provided to others. For example, if only one check-out aisle is accessible, and it is generally used for express service, one way of providing equivalent service is to allow persons with mobility impairments to make all of their purchases at that aisle. This principle also applies with respect to other accessible elements and services. For example, a particular bank may

be in compliance with the accessibility guidelines for new construction incorporated in appendix A with respect to automated teller machines (ATM) at a new branch office by providing one accessible walk-up machine at that location, even though an adjacent walk-up ATM is not accessible and the drive-up ATM is not accessible. However, the bank would be in violation of this section if the accessible ATM was located in a lobby that was locked during evening hours while the drive-up ATM was available to customers without disabilities during those same hours. The bank would need to ensure that the accessible ATM was available to customers during the hours that any of the other ATM's was available.

A number of commenters inquired as to the relationship between this section and Sec.36.307, "Accessible or special goods." Under Sec.36.307, a public accommodation is not required to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities. The rule enunciated in Sec.36.307 is consistent with the "fundamental alteration" defense to the reasonable modifications requirement of Sec.36.302. Therefore, Sec.36.302 would not require the inventory of goods provided by a public accommodation to be altered to include goods with accessibility features. For example, Sec.36.302 would not require a bookstore to stock Brailled books or order Brailled books, if it does not do so in the normal course of its business.

Section 36.302(c)(1) requires that a public accommodation modify its policies, practices, or procedures to permit the use

of a service animal by an individual with a disability in any area open to the general public. The term "service animal" is defined in Sec.36.104 to include guide dogs, signal dogs, or any other animal individually trained to provide assistance to an individual with a disability.

A number of commenters pointed to the difficulty of making the distinction required by the proposed rule between areas open to the general public and those that are not. The ambiguity and uncertainty surrounding these provisions has led the Department to adopt a single standard for all public accommodations.

Section 36.302(c)(1) of the final rule now provides that "[g]enerally, a public accommodation shall modify policies, practices, and procedures to permit the use of a service animal by an individual with a disability." This formulation reflects the general intent of Congress that public accommodations take the necessary steps to accommodate service animals and to ensure that individuals with disabilities are not separated from their service animals. It is intended that the broadest feasible access be provided to service animals in all places of public accommodation, including movie theaters, restaurants, hotels, retail stores, hospitals, and nursing homes (see Education and Labor report at 106; Judiciary report at 59). The section also acknowledges, however, that, in rare circumstances, accommodation of service animals may not be required because a fundamental alteration would result in the nature of the goods, services, facilities, privileges, or accommodations offered or provided, or the safe operation of the public accommodation would be jeopardized.

As specified in Sec.36.302(c)(2), the rule does not require a public accommodation to supervise or care for any service animal. If a service animal must be separated from an individual with a disability in order to avoid a fundamental alteration or a threat to safety, it is the responsibility of the individual with the disability to arrange for the care and supervision of the animal during the period of separation.

Section 36.303 Auxiliary Aids and Services.

Section 36.303 of the final rule requires a public accommodation to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking such steps would fundamentally alter the nature of the goods, services, facilities, advantages, or accommodations being offered or would result in an undue burden. This requirement is based on section 302(b)(2)(A)(iii) of the ADA.

Implicit in this duty to provide auxiliary aids and services is the underlying obligation of a public accommodation to communicate effectively with its customers, clients, patients, or participants who have disabilities affecting hearing, vision, or speech. To give emphasis to this underlying obligation, Sec.36.303(c) of the rule incorporates language derived from section 504 regulations for federally conducted programs (see e.g., 28 CFR 39.160(a)) that requires that appropriate auxiliary aids and services be furnished to ensure that communication with persons with disabilities is as effective as communication with others.

Auxiliary aids and services include a wide range of services and devices for ensuring effective communication. Use of the most advanced technology is not required so long as effective communication is ensured. The Department's proposed Sec.36.303(b) provided a list of examples of auxiliary aids and services that was taken from the definition of auxiliary aids and services in section 3(1) of the ADA and was supplemented by examples from regulations implementing section 504 in federally conducted programs (see e.g., 28 CFR 39.103). A substantial number of commenters suggested that additional examples be added to this list. The Department has added several items to this list but wishes to clarify that the list is not an all-inclusive or exhaustive catalogue of possible or available auxiliary aids or services. It is not possible to provide an exhaustive list, and such an attempt would omit new devices that will become available with emerging technology.

The Department wishes to emphasize that public accommodations must take steps necessary to ensure that an individual with a disability will not be excluded, denied services, segregated or otherwise treated differently from other individuals because of the use of inappropriate or ineffective auxiliary aids.

As provided in Sec.36.303(f), a public accommodation is not required to provide any particular aid or service that would result either in a fundamental alteration in the nature of the goods, services, facilities, privileges, advantages, or accommodations offered or in an undue burden. Both of these statutory limitations are derived from existing

regulations and caselaw under section 504 and are to be applied on a case-by-case basis (see, e.g., 28 CFR 39.160(d) and Southeastern Community College v. Davis, 442 U.S. 397 (1979)). Congress intended that "undue burden" under Sec.36.303 and "undue hardship," which is used in the employment provisions of title I of the ADA, should be determined on a case-by-case basis under the same standards and in light of the same factors (Judiciary report at 59). The rule, therefore, in accordance with the definition of undue hardship in section 101(10) of the ADA, defines undue burden as "significant difficulty or expense" (see Sec..36.104 and 36.303(a)) and requires that undue burden be determined in light of the factors listed in the definition in 36.104.

Consistent with regulations implementing section 504 in federally conducted programs (see, e.g., 28 CFR 39.160(d)), Sec.36.303(f) provides that the fact that the provision of a particular auxiliary aid or service would result in an undue burden does not relieve a public accommodation from the duty to furnish an alternative auxiliary aid or service, if available, that would not result in such a burden.

Section 36.303(g) of the proposed rule has been deleted from this section and included in a new Sec.36.306. That new section continues to make clear that the auxiliary aids requirement does not mandate the provision of individually prescribed devices, such as prescription eyeglasses or hearing aids.

The costs of compliance with the requirements of this section may not be financed by surcharges limited to

particular individuals with disabilities or any group of individuals with disabilities (Sec.36.301(c)).

Section 36.304 Removal of Barriers

Section 36.304 requires the removal of architectural barriers and communication barriers that are structural in nature in existing facilities, where such removal is readily achievable, i.e., easily accomplishable and able to be carried out without much difficulty or expense. This requirement is based on section 302(b)(2)(A)(iv) of the ADA.

A number of commenters interpreted the phrase "communication barriers that are structural in nature" broadly to encompass ´the provision of communications devices such as TDD's, telephone handset amplifiers, assistive listening devices, and digital check-out displays. The statute, however, as read by the Department, limits the application of the phrase "communications barriers that are structural in nature" to those barriers that are an integral part of the physical structure of a facility. In addition to the communications barriers posed by permanent signage and alarm systems noted by Congress (see Education and Labor report at 110), the Department would also include among the communications barriers covered by Sec.36.304 the failure to provide adequate sound buffers, and the presence of physical partitions that hamper the passage of sound waves between employees and customers. Given that Sec.36.304's proper focus is on the removal of physical barriers, the Department believes that the obligation to provide communications equipment and devices such as TDD's, telephone handset amplifiers, assistive listening devices, and digital check-out displays is more appropriately determined

by the requirements for auxiliary aids and services under Sec.36.303 (see Education and Labor report at 107 - 108). The obligation to remove communications barriers that are structural in nature under Sec.36.304, of course, is independent of any obligation to provide auxiliary aids and services under Sec.36.303.

The statutory provision also requires the readily achievable removal of certain barriers in existing vehicles and rail passenger cars. This transportation requirement is not included in Sec.36.304, but rather in Sec.36.310(b) of the rule.

In striking a balance between guaranteeing access to individuals with disabilities and recognizing the legitimate cost concerns of businesses and other private entities, the ADA establishes different standards for existing facilities and new construction. In existing facilities, which are the subject of Sec.36.304, where retrofitting may prove costly, a less rigorous degree of accessibility is required than in the case of new construction and alterations (see Sec..36.401 - 36.406) where accessibility can be more conveniently and economically incorporated in the initial stages of design and construction.

The requirement to remove architectural barriers includes the removal of physical barriers of any kind. For example, Sec.36.304 requires the removal, when readily achievable, of barriers caused by the location of temporary or movable structures, such as furniture, equipment, and display racks. In order to provide access to individuals who use wheelchairs, for example, restaurants may need to rearrange

tables and chairs, and department stores may need to reconfigure display racks and shelves. As stated in Sec.36.304(f), such actions are not readily achievable to the extent that they would result in a significant loss of selling or serving space. If the widening of all aisles in selling or serving areas is not readily achievable, then selected widening should be undertaken to maximize the amount of merchandise or the number of tables accessible to individuals who use wheelchairs. Access to goods and services provided in any remaining inaccessible areas must be made available through alternative methods to barrier removal, as required by Sec.36.305.

Because the purpose of title III of the ADA is to ensure that public accommodations are accessible to their customers, clients, or patrons (as opposed to their employees, who are the focus of title I), the obligation to remove barriers under Sec.36.304 does not extend to areas of a facility that are used exclusively as employee work areas.

Section 36.304(b) provides a wide-ranging list of the types of modest measures that may be taken to remove barriers and that are likely to be readily achievable. The list includes examples of measures, such as adding raised letter markings on elevator control buttons and installing flashing alarm lights, that would be used to remove communications barriers that are structural in nature. It is not an exhaustive list, but merely an illustrative one. Moreover, the inclusion of a measure on this list does not mean that it is readily achievable in all cases. Whether or not any of these measures is readily achievable is to be determined on a case-by-case basis in light of the particular circumstances presented and the factors listed in the definition of readily

achievable (Sec.36.104).

Section 36.304(f)(1) of the proposed rule, which stated that "barrier removal is not readily achievable if it would result in significant loss of profit or significant loss of efficiency of operation," has been deleted from the final rule. Many commenters objected to this provision because it impermissibly introduced the notion of profit into a statutory standard that did not include it. Concern was expressed that, in order for an action not to be considered readily achievable, a public accommodation would inappropriately have to show, for example, not only that the action could not be done without "much difficulty or expense", but that a significant loss of profit would result as well. In addition, some commenters asserted use of the word "significant," which is used in the definition of undue hardship under title I (the standard for interpreting the meaning of undue burden as a defense to title III's auxiliary aids requirements) (see Sec..36.104, 36.303(f)), blurs the fact that the readily achievable standard requires a lower level of effort on the part of a public accommodation than does the undue burden standard.

The obligation to engage in readily achievable barrier removal is a continuing one. Over time, barrier removal that initially was not readily achievable may later be required because of changed circumstances. Many commenters expressed support for the Department's position that the obligation to comply with Sec.36.304 is continuing in nature. Some urged that the rule require public accommodations to assess their compliance on at least an annual basis in light of changes in resources and other factors that would be relevant to determining what barrier removal measures would

be readily achievable.

Although the obligation to engage in readily achievable barrier removal is clearly a continuing duty, the Department has declined to establish any independent requirement for an annual assessment or self-evaluation. It is best left to the public accommodations subject to Sec.36.304 to establish policies to assess compliance that are appropriate to the particular circumstances faced by the wide range of public accommodations covered by the ADA. However, even in the absence of an explicit regulatory requirement for periodic self-evaluations, the Department still urges public accommodations to establish procedures for an ongoing assessment of their compliance with the ADA's barrier removal requirements. The Department recommends that this process include appropriate consultation with individuals with disabilities or organizations representing them. A serious effort at self-assessment and consultation can diminish the threat of litigation and save resources by identifying the most efficient means of providing required access.

Section 36.304(c)(1) places the highest priority on measures that will enable individuals with disabilities to physically enter a place of public accommodation. This priority on "getting through the door" recognizes that providing actual physical access to a facility from public sidewalks, public transportation, or parking is generally preferable to any alternative arrangements in terms of both business efficiency and the dignity of individuals with disabilities.

The next priority, which is established in Sec.36.304(c)(2),

is for measures that provide access to those areas of a place of public accommodation where goods and services are made available to the public. For example, in a hardware store, to the extent that it is readily achievable to do so, individuals with disabilities should be given access not only to assistance at the front desk, but also access, like that available to other customers, to the retail display areas of the store.

The Department agrees with those commenters who argued that access to the areas where goods and services are provided is generally more important than the provision of restrooms. Therefore, the final rule reverses priorities two and three of the proposed rule in order to give lower priority to accessible restrooms. Consequently, the third priority in the final rule (Sec.36.304(c)(3)) is for measures to provide access to restroom facilities and the last priority is placed on any remaining measures required to remove barriers.

Section 36.304(d) requires that measures taken to remove barriers under Sec.36.304 be subject to subpart D's requirements for alterations (except for the path of travel requirements in Sec.36.403). It only permits deviations from the subpart D requirements when compliance with those requirements is not readily achievable. In such cases, Sec.36.304(d) permits measures to be taken that do not fully comply with the subpart D requirements, so long as the measures do not pose a significant risk to the health or safety of individuals with disabilities or others.

This approach represents a change from the proposed rule which stated that "readily achievable" measures taken solely to remove barriers under Sec.36.304 are exempt from the alterations requirements of subpart D. The intent of the

proposed rule was to maximize the flexibility of public accommodations in undertaking barrier removal by allowing deviations from the technical standards of subpart D. It was thought that allowing slight deviations would provide access and release additional resources for expanding the amount of barrier removal that could be obtained under the readily achievable standard.

The Department in the final rule has adopted the view of many commenters that (1) public accommodations should in the first instance be required to comply with the subpart D standards for alterations where it is readily achievable to do so and (2) safe, readily achievable measures must be taken when compliance with the subpart D standards is not readily achievable. Reference to the subpart D standards in this manner will promote certainty and good design at the same time that permitting slight deviations will expand the amount of barrier removal that may be achieved under Sec.36.304.

Because of the inconvenience to individuals with disabilities and the safety problems involved in the use of portable ramps, Sec.36.304(e) permits the use of a portable ramp to comply with Sec.36.304(a) only when installation of a permanent ramp is not readily achievable. In order to promote safety, Sec.36.304(e) requires that due consideration be given to the incorporation of features such as nonslip surfaces, railings, anchoring, and strength of materials in any portable ramp that is used.

Section 36.305 Alternatives to Barrier Removal

Section 36.305 specifies that where a public accommodation can demonstrate that removal of a barrier is not readily achievable, the public accommodation must make its goods, services, facilities, privileges, advantages, or accommodations available through alternative methods, if such methods are readily achievable. This requirement is based on section 302(b)(2)(A)(v) of the ADA.

For example, if it is not readily achievable for a retail store to raise, lower, or remove shelves or to rearrange display racks to provide accessible aisles, the store must, if readily achievable, provide a clerk or take other alternative measures to retrieve inaccessible merchandise. Similarly, if it is not readily achievable to ramp a long flight of stairs leading to the front door of a restaurant or a pharmacy, the restaurant or the pharmacy must take alternative measures, if readily achievable, such as providing curb service or home delivery. If, within a restaurant, it is not readily achievable to remove physical barriers to a certain section of a restaurant, the restaurant must, where it is readily achievable to do so, offer the same menu in an accessible area of the restaurant.

Where alternative methods are used to provide access, a public accommodation may not charge an individual with a disability for the costs associated with the alternative method (see Sec.36.301(c)). Further analysis of the issue of charging for alternative measures may be found in the preamble discussion of Sec.36.301(c).

In some circumstances, because of security considerations, some alternative methods may not be readily achievable. The rule does not require a cashier to leave his or her post to retrieve items for individuals with disabilities, if there are no other employees on duty.

Section 36.305(c) of the proposed rule has been deleted and the requirements have been included in a new Sec.36.306. That section makes clear that the alternative methods requirement does not mandate the provision of personal devices, such as wheelchairs, or services of a personal nature.

Section 36.306 Personal Devices and Services

The final rule includes a new Sec.36.306, entitled "Personal devices and services." Section 36.306 of the proposed rule, "Readily achievable and undue burden: Factors to be considered," was deleted for the reasons described in the preamble discussion of the definition of the term "readily achievable" in Sec.36.104. In place of Sec..36.303(g) and 36.305(c) of the proposed rule, which addressed the issue of personal devices and services in the contexts of auxiliary aids and alternatives to barrier removal, Sec.36.306 provides a general statement that the regulation does not require the provision of personal devices and services. This section states that a public accommodation is not required to provide its customers, clients, or participants with personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; or services of a personal nature including assistance in eating, toileting, or dressing.

This statement serves as a limitation on all the requirements of the regulation. The personal devices and services limitation was intended to have general application in the proposed rule in all contexts where it was relevant. The final rule, therefore, clarifies, this point by including a general provision that will explicitly apply not just to auxiliary aids and services and alternatives to barrier removal, but across-the-board to include such relevant areas as modifications in policies, practices, and procedures (Sec.36.302) and examinations and courses (Sec.36.309), as well.

The Department wishes to clarify that measures taken as alternatives to barrier removal, such as retrieving items from shelves or providing curb service or home delivery, are not to be considered personal services. Similarly, minimal actions that may be required as modifications in policies, practices, or procedures under Sec.36.302, such as a waiter's removing the cover from a customer's straw, a kitchen's cutting up food into smaller pieces, or a bank's filling out a deposit slip, are not services of a personal nature within the meaning of Sec.36.306. (Of course, such modifications may be required under Sec.36.302 only if they are "reasonable.") Similarly, this section does not preclude the short-term loan of personal receivers that are part of an assistive listening system.

Of course, if personal services are customarily provided to the customers or clients of a public accommodation, e.g., in a hospital or senior citizen center, then these personal services should also be provided to persons with disabilities using

the public accommodation.

Section 36.310 Transportation Provided by Public Accommodations

Section 36.310 contains specific provisions relating to public accommodations that provide transportation to their clients or customers. This section has been substantially revised in order to coordinate the requirements of this section with the requirements applicable to these transportation systems that will be contained in the regulations issued by the Secretary of Transportation pursuant to section 306 of the ADA, to be codified at 49 CFR part 37. The Department notes that, although the responsibility for issuing regulations applicable to transportation systems operated by public accommodations is divided between this Department and the Department of Transportation, enforcement authority is assigned only to the Department of Justice.

The Department received relatively few comments on this section of the proposed rule. Most of the comments addressed issues that are not specifically addressed in this part, such as the standards for accessible vehicles and the procedure for determining whether equivalent service is provided. Those standards will be contained in the regulation issued by the Department of Transportation. Other commenters raised questions about the types of transportation that will be subject to this section. In response to these inquiries, the Department has revised the list of examples contained in the regulation.

Paragraph (a)(1) states the general rule that covered public accommodations are subject to all of the specific provisions of subparts B, C, and D, except as provided in Sec.36.310. Examples of operations covered by the requirements are listed in paragraph (a)(2). The stated examples include hotel and motel airport shuttle services, customer shuttle bus services operated by private companies and shopping centers, student transportation, and shuttle operations of recreational facilities such as stadiums, zoos, amusement parks, and ski resorts. This brief list is not exhaustive. The section applies to any fixed route or demand responsive transportation system operated by a public accommodation for the benefit of its clients or customers. The section does not apply to transportation services provided only to employees. Employee transportation will be subject to the regulations issued by the Equal Employment Opportunity Commission to implement title I of the Act. However, if employees and customers or clients are served by the same transportation system, the provisions of this section will apply.

Paragraph (b) specifically provides that a public accommodation shall remove transportation barriers in existing vehicles to the extent that it is readily achievable to do so, but that the installation of hydraulic or other lifts is not required.

Paragraph (c) provides that public accommodations subject to this section shall comply with the requirements for transportation vehicles and systems contained in the regulations issued by the Secretary of Transportation.

Subpart D -- New Construction and Alterations

Subpart D implements section 303 of the Act, which requires that newly constructed or altered places of public accommodation or commercial facilities be readily accessible to and usable by individuals with disabilities. This requirement contemplates a high degree of convenient access. It is intended to ensure that patrons and employees of places of public accommodation and employees of commercial facilities are able to get to, enter, and use the facility.

Potential patrons of places of public accommodation, such as retail establishments, should be able to get to a store, get into the store, and get to the areas where goods are being provided. Employees should have the same types of access, although those individuals require access to and around the employment area as well as to the area in which goods and services are provided.

The ADA is geared to the future -- its goal being that, over time, access will be the rule, rather than the exception. Thus, the Act only requires modest expenditures, of the type addressed in Sec.36.304 of this part, to provide access to existing facilities not otherwise being altered, but requires all new construction and alterations to be accessible.

The Act does not require new construction or alterations; it simply requires that, when a public accommodation or other private entity undertakes the construction or alteration of a facility subject to the Act, the newly constructed or altered facility must be made accessible. This subpart establishes the requirements for new construction and alterations.

As explained under the discussion of the definition of "facility," Sec.36.104, pending development of specific requirements, the Department will not apply this subpart to places of public accommodation located in mobile units, boats, or other conveyances.

Any sales or rental establishment of the type that is included in paragraph (5) of the definition of "place of public accommodation" (for example, a bakery, grocery store, clothing store, or hardware store) is considered a sales or rental establishment for purposes of this definition; the other types of public accommodations (e.g., restaurants, laundromats, banks, travel services, health spas) are not.

Section 36.402 Alterations

Sections 36.402 - 36.405 implement section 303(a)(2) of the Act, which requires that alterations to existing facilities be made in a way that ensures that the altered portion is readily accessible to and usable by individuals with disabilities. This part does not require alterations; it simply provides that when alterations are undertaken, they must be made in a manner that provides access.

Section 36.402(a)(1) provides that any alteration to a place of public accommodation or a commercial facility, after January 26, 1992, shall be made so as to ensure that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The proposed rule provided that an alteration would be

deemed to be undertaken after January 26, 1992, if the physical alteration of the property is in progress after that date. Commenters pointed out that this provision would, in some cases, produce an unjust result by requiring the redesign or retrofitting of projects initiated before this part established the ADA accessibility standards. The Department agrees that the proposed rule would, in some instances, unfairly penalize projects that were substantially completed before the effective date. Therefore, paragraph (a)(2) has been revised to specify that an alteration will be deemed to be undertaken after January 26, 1992, if the physical alteration of the property begins after that date. As a matter of interpretation, the Department will construe this provision to apply to alterations that require a permit from a State, County or local government, if physical alterations pursuant to the terms of the permit begin after January 26, 1992. The Department recognizes that this application of the effective date may require redesign of some facilities that were planned prior to the publication of this part, but no retrofitting will be required of facilities on which the physical alterations were initiated prior to the effective date of the Act. Of course, nothing in this section in any way alters the obligation of any facility to remove architectural barriers in existing facilities to the extent that such barrier removal is readily achievable.

Paragraph (b) provides that, for the purposes of this part, an "alteration" is a change to a place of public accommodation or a commercial facility that affects or could affect the usability of the building or facility or any part thereof. One commenter suggested that the concept of usability should apply only to those changes that affect access by persons with disabilities. The Department remains convinced that the

Act requires the concept of "usability" to be read broadly to include any change that affects the usability of the facility, not simply changes that relate directly to access by individuals with disabilities.

Therefore, in this final rule paragraph (b)(1) has been revised to include the major provisions of paragraphs (b)(1) and (b)(2) of the proposed rule. The examples in the proposed rule have been deleted. Paragraph (b)(1) now provides that alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. Normal maintenance, reroofing, painting or wallpapering, asbestos removal, or changes to mechanical and electrical systems are not alterations unless they affect the usability of building or facility.

Paragraph (b)(2) of this final rule was added to clarify the scope of the alterations requirement. Paragraph (b)(2) provides that if existing elements, spaces, or common areas are altered, then each such altered element, space, or area shall comply with the applicable provisions of appendix A (ADAAG). As provided in Sec.36.403, if an altered space or area is an area of the facility that contains a primary function, then the requirements of that section apply.

Therefore, when an entity undertakes a minor alteration to a place of public accommodation or commercial facility, such as moving an electrical outlet, the new outlet must be installed in compliance with ADAAG. (Alteration of the

elements listed in Sec.36.403(c)(2) cannot trigger a path of travel obligation.) If the alteration is to an area, such as an employee lounge or locker room, that is not an area of the facility that contains a primary function, that area must comply with ADAAG. It is only when an alteration affects access to or usability of an area containing a primary function, as opposed to other areas or the elements listed in Sec.36.403(c)(2), that the path of travel to the altered area must be made accessible.

The Department received relatively few comments on paragraph (c), which explains the statutory phrase "to the maximum extent feasible." Some commenters suggested that the regulation should specify that cost is a factor in determining whether it is feasible to make an altered area accessible. The legislative history of the ADA indicates that the concept of feasibility only reaches the question of whether it is possible to make the alteration accessible in compliance with this part. Costs are to be considered only when an alteration to an area containing a primary function triggers an additional requirement to make the path of travel to the altered area accessible.

Section 36.402(c) is, therefore, essentially unchanged from the proposed rule. At the recommendation of a commenter, the Department has inserted the word "virtually" to modify "impossible" to conform to the language of the legislative history. It explains that the phrase "to the maximum extent feasible" as used in this section applies to the occasional case where the nature of an existing facility makes it virtually impossible to comply fully with applicable accessibility standards through a planned alteration. In the occasional cases in which full compliance is impossible,

alterations shall provide the maximum physical accessibility feasible. Any features of the facility that are being altered shall be made accessible unless it is technically infeasible to do so. If providing accessibility in conformance with this section to individuals with certain disabilities (e.g., those who use wheelchairs) would not be feasible, the facility shall be made accessible to persons with other types of disabilities (e.g., those who use crutches or who have impaired vision or hearing, or those who have other types of impairments).

Section 36.403 Alterations: Path of Travel

Section 36.403 implements the statutory requirement that any alteration that affects or could affect the usability of or access to an area of a facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area, and the restrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the cost and scope of such alterations is disproportionate to the cost of the overall alteration. Paragraph (a) restates this statutory requirement.

Paragraph (b) defines a "primary function" as a major activity for which the facility is intended. This paragraph is unchanged from the proposed rule. Areas that contain a primary function include, but are not limited to, the customer services lobby of a bank, the dining area of a cafeteria, the meeting rooms in a conference center, as well as offices and all other work areas in which the activities of the public accommodation or other private entities using the

facility are carried out. The concept of "areas containing a primary function" is analogous to the concept of "functional spaces" in Sec.3.5 of the existing Uniform Federal Accessibility Standards, which defines "functional spaces" as "[t]he rooms and spaces in a building or facility that house the major activities for which the building or facility is intended."

Paragraph (b) provides that areas such as mechanical rooms, boiler rooms, supply storage rooms, employee lounges and locker rooms, janitorial closets, entrances, corridors, and restrooms are not areas containing a primary function. There may be exceptions to this general rule. For example, the availability of public restrooms at a place of public accommodation at a roadside rest stop may be a major factor affecting customers' decisions to patronize the public accommodation. In that case, a restroom would be considered to be an "area containing a primary function" of the facility.

Most of the commenters who addressed this issue supported the approach taken by the Department; but a few commenters suggested that areas not open to the general public or those used exclusively by employees should be excluded from the definition of primary function. The preamble to the proposed rule noted that the Department considered an alternative approach to the definition of "primary function," under which a primary function of a commercial facility would be defined as a major activity for which the facility was intended, while a primary function of a place of public accommodation would be defined as an activity which involves providing significant goods, services, facilities, privileges, advantages, or accommodations. However, the

Department concluded that, although portions of the legislative history of the ADA support this alternative, the better view is that the language now contained in Sec.36.403(b) most accurately reflects congressional intent. No commenter made a persuasive argument that the Department's interpretation of the legislative history is incorrect.

When the ADA was introduced, the requirement to make alterations accessible was included in section 302 of the Act, which identifies the practices that constitute discrimination by a public accommodation. Because section 302 applies only to the operation of a place of public accommodation, the alterations requirement was intended only to provide access to clients and customers of a public accommodation. It was anticipated that access would be provided to employees with disabilities under the "reasonable accommodation" requirements of title I. However, during its consideration of the ADA, the House Judiciary Committee amended the bill to move the alterations provision from section 302 to section 303, which applies to commercial facilities as well as public accommodations. The Committee report accompanying the bill explains that:

New construction and alterations of both public accommodations and commercial facilities must be made readily accessible to and usable by individuals with disabilities * * *. Essentially, [this requirement] is designed to ensure that patrons and employees of public accommodations and commercial facilities are able to get to, enter and use the facility * * *. The rationale for making new construction accessible applies with equal force to

alterations.

Judiciary report at 62 - 63 (emphasis added).

The ADA, as enacted, contains the language of section 303 as it was reported out of the Judiciary Committee. Therefore, the Department has concluded that the concept of "primary function" should be applied in the same manner to places of public accommodation and to commercial facilities, thereby including employee work areas in places of public accommodation within the scope of this section.

Paragraph (c) provides examples of alterations that affect the usability of or access to an area containing a primary function. The examples include: Remodeling a merchandise display area or employee work areas in a department store; installing a new floor surface to replace an inaccessible surface in the customer service area or employee work areas of a bank; redesigning the assembly line area of a factory; and installing a computer center in an accounting firm. This list is illustrative, not exhaustive. Any change that affects the usability of or access to an area containing a primary function triggers the statutory obligation to make the path of travel to the altered area accessible.

When the proposed rule was drafted, the Department believed that the rule made it clear that the ADA would require alterations to the path of travel only when such alterations are not disproportionate to the alteration to the primary function area. However, the comments that the Department received indicated that many commenters believe that even minor alterations to individual elements would

require additional alterations to the path of travel. To address the concern of these commenters, a new paragraph (c)(2) has been added to the final rule to provide that alterations to such elements as windows, hardware, controls (e.g. light switches or thermostats), electrical outlets, or signage will not be deemed to be alterations that affect the usability of or access to an area containing a primary function. Of course, each element that is altered must comply with ADAAG (appendix A) . The cost of alterations to individual elements would be included in the overall cost of an alteration for purposes of determining disproportionality and would be counted when determining the aggregate cost of a series of small alterations in accordance with Sec.36.401(h) if the area is altered in a manner that affects access to or usability of an area containing a primary function.

Paragraph (d) concerns the respective obligations of landlords and tenants in the cases of alterations that trigger the path of travel requirement under Sec.36.403. This paragraph was contained in the landlord/tenant section of the proposed rule, Sec.36.201(b). If a tenant is making alterations upon its premises pursuant to terms of a lease that grant it the authority to do so (even if they constitute alterations that trigger the path of travel requirement), and the landlord is not making alterations to other parts of the facility, then the alterations by the tenant on its own premises do not trigger a path of travel obligation upon the landlord in areas of the facility under the landlord's authority that are not otherwise being altered. The legislative history makes clear that the path of travel requirement applies only to the entity that is already making the alteration, and thus the Department has not changed the final rule despite

numerous comments suggesting that the tenant be required to provide a path of travel.

Paragraph (e) defines a "path of travel" as a continuous, unobstructed way of pedestrian passage by means of which an altered area may be approached, entered, and exited; and which connects the altered area with an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and other parts of the facility. This concept of an accessible path of travel is analogous to the concepts of "accessible route" and "circulation path" contained in section 3.5 of the current UFAS. Some commenters suggested that this paragraph should address emergency egress. The Department disagrees. "Path of travel" as it is used in this section is a term of art under the ADA that relates only to the obligation of the public accommodation or commercial facility to provide additional accessible elements when an area containing a primary function is altered. The Department recognizes that emergency egress is an important issue, but believes that it is appropriately addressed in ADAAG (appendix A), not in this paragraph. Furthermore, ADAAG does not require changes to emergency egress areas in alterations.

Paragraph (e)(2) is drawn from section 3.5 of UFAS. It provides that an accessible path of travel may consist of walks and sidewalks, curb ramps and other interior or exterior pedestrian ramps; clear floor paths through lobbies, corridors, rooms, and other improved areas; parking access aisles; elevators and lifts; or a combination of such elements. Paragraph (e)(3) provides that, for the purposes of this part, the term "path of travel" also includes the restrooms, telephones, and drinking fountains serving an altered area.

Although the Act establishes an expectation that an accessible path of travel should generally be included when alterations are made to an area containing a primary function, Congress recognized that, in some circumstances, providing an accessible path of travel to an altered area may be sufficiently burdensome in comparison to the alteration being undertaken to the area containing a primary function as to render this requirement unreasonable. Therefore, Congress provided, in section 303(a)(2) of the Act, that alterations to the path of travel that are disproportionate in cost and scope to the overall alteration are not required.

The Act requires the Attorney General to determine at what point the cost of providing an accessible path of travel becomes disproportionate. The proposed rule provided three options for making this determination.

Two committees of Congress specifically addressed this issue: the House Committee on Education and Labor and the House Committee on the Judiciary. The reports issued by each committee suggested that accessibility alterations to a path of travel might be "disproportionate" if they exceed 30% of the alteration costs (Education and Labor report at 113; Judiciary report at 64). Because the Department believed that smaller percentage rates might be appropriate, the proposed rule sought comments on three options: 10%, 20%, or 30%.

The Department received a significant number of comments on this section. Commenters representing individuals with disabilities generally supported the use of 30% (or more);

commenters representing covered entities supported a figure of 10% (or less). The Department believes that alterations made to provide an accessible path of travel to the altered area should be deemed disproportionate to the overall alteration when the cost exceeds 20% of the cost of the alteration to the primary function area. This approach appropriately reflects the intent of Congress to provide access for individuals with disabilities without causing economic hardship for the covered public accommodations and commercial facilities.

The Department has determined that the basis for this cost calculation shall be the cost of the alterations to the area containing the primary function. This approach will enable the public accommodation or other private entity that is making the alteration to calculate its obligation as a percentage of a clearly ascertainable base cost, rather than as a percentage of the "total" cost, an amount that will change as accessibility alterations to the path of travel are made.

Paragraph (f)(2) (paragraph (e)(2) in the proposed rule) is unchanged. It provides examples of costs that may be counted as expenditures required to provide an accessible path of travel. They include:

- Costs associated with providing an accessible entrance and an accessible route to the altered area, for example, the cost of widening doorways or installing ramps;

- Costs associated with making restrooms accessible, such as installing grab bars, enlarging toilet stalls, insulating pipes, or installing accessible faucet controls;

- Costs associated with providing accessible telephones, such as relocating telephones to an accessible height, installing amplification devices, or installing telecommunications devices for deaf persons (TDD's);

- Costs associated with relocating an inaccessible drinking fountain.

Paragraph (f)(1) of the proposed rule provided that when the cost of alterations necessary to make the path of travel serving an altered area fully accessible is disproportionate to the cost of the overall alteration, the path of travel shall be made accessible to the maximum extent feasible. In response to the suggestion of a commenter, the Department has made an editorial change in the final rule (paragraph (g)(1)) to clarify that if the cost of providing a fully accessible path of travel is disproportionate, the path of travel shall be made accessible "to the extent that it can be made accessible without incurring disproportionate costs."

Paragraph (g)(2) (paragraph (f)(2) in the NPRM) establishes that priority should be given to those elements that will provide the greatest access, in the following order: An accessible entrance; an accessible route to the altered area; at least one accessible restroom for each sex or a single unisex restroom; accessible telephones; accessible drinking fountains; and, whenever possible, additional accessible elements such as parking, storage, and alarms. This paragraph is unchanged from the proposed rule.

Paragraph (h) (paragraph (g) in the proposed rule) provides

that the obligation to provide an accessible path of travel may not be evaded by performing a series of small alterations to the area served by a single path of travel if those alterations could have been performed as a single undertaking. If an area containing a primary function has been altered without providing an accessible path of travel to serve that area, and subsequent alterations of that area, or a different area on the same path of travel, are undertaken within three years of the original alteration, the total cost of alterations to primary function areas on that path of travel during the preceding three year period shall be considered in determining whether the cost of making the path of travel serving that area accessible is disproportionate. Only alterations undertaken after January 26, 1992, shall be considered in determining if the cost of providing accessible features is disproportionate to the overall cost of the alterations.

Section 36.406 Standards for New Construction and Alterations

Section 36.406 implements the requirements of sections 306(b) and 306(c) of the Act, which require the Attorney General to promulgate standards for accessible design for buildings and facilities subject to the Act and this part that are consistent with the supplemental minimum guidelines and requirements for accessible design published by the Architectural and Transportation Barriers Compliance Board (ATBCB or Board) pursuant to section 504 of the Act. This section of the rule provides that new construction and alterations subject to this part shall comply with the standards for accessible design published as appendix A to

this part.

Appendix A contains the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) which is being published by the ATBCB as a final rule elsewhere in this issue of the Federal Register. As proposed in this Department's proposed rule, Sec.36.406(a) adopts ADAAG as the accessibility standard applicable under this rule.

Paragraph (b) was not included in the proposed rule. It provides, in chart form, guidance for using ADAAG together with subparts A through D of this part when determining requirements for a particular facility. This chart is intended solely as guidance for the user; it has no effect for purposes of compliance or enforcement. It does not necessarily provide complete or mandatory information.

Proposed Sec.36.406(b) is not included in the final rule. That provision, which would have taken effect only if the final rule had followed the proposed Option Two for Sec.36.401(a), is unnecessary because the Department has chosen Option One, as explained in the preamble for that section.

Section 504(a) of the ADA requires the ATBCB to issue minimum guidelines to supplement the existing Minimum Guidelines and Requirements for Accessible Design (MGRAD) (36 CFR part 1190) for purposes of title III. According to section 504(b) of the Act, the guidelines are to establish additional requirements, consistent with the Act, "to ensure that buildings and facilities are accessible, in terms

of architecture and design, ...and communication, to individuals with disabilities." Section 306(c) of the Act requires that the accessibility standards included in the Department's regulations be consistent with the minimum guidelines, in this case ADAAG.

As explained in the ATBCB's preamble to ADAAG, the substance and form of the guidelines are drawn from several sources. They use as their model the 1984 Uniform Federal Accessibility Standards (UFAS) (41 CFR part 101, subpart 101 -19.6, appendix), which are the standards implementing the Architectural Barriers Act. UFAS is based on the Board's 1982 MGRAD. ADAAG follows the numbering system and format of the private sector American National Standard Institute's ANSI A117.1 standards. (American National Specifications for Making Buildings and Facilities Accessible to and Usable by Physically Handicapped People (ANSI A117 - 1980) and American National Standard for Buildings and Facilities -- Providing Accessibility and Usability for Physically Handicapped People (ANSI A117.1 - 1986).) ADAAG supplements MGRAD. In developing ADAAG, the Board made every effort to be consistent with MGRAD and the current and proposed ANSI Standards, to the extent consistent with the ADA.

ADAAG consists of nine main sections and a separate appendix. Sections 1 through 3 contain general provisions and definitions. Section 4 contains scoping provisions and technical specifications applicable to all covered buildings and facilities. The scoping provisions are listed separately for new construction of sites and exterior facilities; new construction of buildings; additions; alterations; and alterations to historic properties. The technical

specifications generally reprint the text and illustrations of the ANSI A117.1 standard, except where differences are noted by italics. Sections 5 through 9 of the guidelines are special application sections and contain additional requirements for restaurants and cafeterias, medica care facilities, business and mercantile facilities, libraries, and transient lodging. The appendix to the guidelines contains additional information to aid in understanding the technical specifications. The section numbers in the appendix correspond to the sections of the guidelines to which they relate. An asterisk after a section number indicates that additional information appears in the appendix.

ADAAG's provisions are further explained under Summary of ADAAG below.

General Comments

The Department, however, must comply with the requirements of the ADA, the Federal Advisory Committee Act (5 U.S.C app. 1 et seq.) and the Administrative Procedure Act (5 U.S.C 551 et seq.). Neither the Department nor the Board can adopt private requirements wholesale. Furthermore, neither the 1991 ANSI A117 Standard revision nor the BCMC process is complete. Although the ANSI and BCMC provisions are not final, the Board has carefully considered both the draft BCMC scoping provisions and draft ANSI technical standards and included their language in ADAAG wherever consistent with the ADA.

Comments on specific provisions of proposed ADAAG

Summary of ADAAG

This section of the preamble summarizes the structure of ADAAG, and highlights the more important portions.

- Sections 1 Through 3

Sections 1 through 3 contain general requirements, including definitions.

- Section 4.1.1, Application

Section 4 contains scoping requirements. Section 4.1.1, Application, provides that all areas of newly designed or newly constructed buildings and facilities and altered portions of existing buildings and facilities required to be accessible by Sec.4.1.6 must comply with the guidelines unless otherwise provided in Sec.4.1.1 or a special application section. It addresses areas used only by employees as work areas, temporary structures, and general exceptions.

Section 4.1.1(3) preserves the basic principle of the proposed rule: Areas that may be used by employees with disabilities shall be designed and constructed so that an individual with a disability can approach, enter, and exit the area. The language has been clarified to provide that it applies to any area used only as a work area (not just to areas "that may be used by employees with disabilities"), and that the guidelines do not require that any area used as an individual work station be designed with maneuvering space

or equipped to be accessible. The appendix to ADAAG explains that work areas must meet the guidelines' requirements for doors and accessible routes, and recommends, but does not require, that 5% of individual work stations be designed to permit a person using a wheelchair to maneuver within the space.

Further discussion of work areas is found in the preamble concerning proposed Sec.36.401(b).

- Section 4.1.2, Accessible Sites and Exterior Facilities: New Construction

This section addresses exterior features, elements, or spaces such as parking, portable toilets, and exterior signage, in new construction. Interior elements and spaces are covered by Sec.4.1.3.

The final rule retains the UFAS scoping for parking but also requires that at least one of every eight accessible parking spaces be designed with adequate adjacent space to deploy a lift used with a van. These spaces must have a sign indicating that they are van-accessible, but they are not to be reserved exclusively for van users.

- Section 4.1.3, Accessible Buildings: New Construction

This section establishes scoping requirements for new construction of buildings and facilities.

Sections 4.1.3 (1) through (4) cover accessible routes,

protruding objects, ground and floor surfaces, and stairs.

Section 4.1.3(5) generally requires elevators to serve each level in a newly constructed building, with four exceptions included in the subsection. Exception 1 is the "elevator exception" established in Sec.36.401(d), which must be read with this section. Exception 4 allows the use of platform lifts under certain conditions.

- Section 4.1.6, Alterations

An alteration is a change to a building or facility that affects or could affect the usability of or access to the building or facility or any part thereof. There are three general principles for alterations. First, if any existing element or space is altered, the altered element or space must meet new construction requirements (section 4.1.6(1)(b)). Second, if alterations to the elements in a space when considered together amount to an alteration of the space, the entire space must meet new construction requirements (section 4.1.6(1)(c)). Third, if the alteration affects or could affect the usability of or access to an area containing a primary function, the path of travel to the altered area and the restrooms, drinking fountains, and telephones serving the altered area must be made accessible unless it is disproportionate to the overall alterations in terms of cost and scope as determined under criteria established by the Attorney General (Sec.4.1.6(2)).

Section 4.1.6 should be read with Sec..36.402 through 36.405. Requirements concerning alterations to an area serving a primary function are addressed with greater detail

in the latter sections than in section 4.1.6(2). Section 4.1.6(1)(j) deals with technical infeasibility. Section 4.1.6(3) contains special technical provisions for alterations to existing buildings and facilities.

- Sections 5 Through 9

These are special application sections and contain additional requirements for restaurants and cafeterias, medical care facilities, business and mercantile facilities, libraries, and transient lodging. For example, at least 5 percent, but not less than one, of the fixed tables in a restaurant must be accessible.

- Section 9, Accessible Transient Lodging

Section 9 addresses two types of transient lodging: hotels, motels, inns, boarding houses, dormitories, resorts, and other similar places (sections 9.1 through 9.4); and homeless shelters, halfway houses, transient group homes, and other social service establishments (section 9.5). The interplay of the ADA and Fair Housing Act with respect to such facilities is addressed in the preamble discussion of the definition of "place of public accommodation" in Sec.36.104.

Section 10, Transportation Facilities

Section 10 of ADAAG is reserved. On March 20, 1991, the ATBCB published a supplemental notice of proposed rulemaking (56 FR 11874) to establish special access

requirements for transportation facilities. The Department anticipates that when the ATBCB issues final guidelines for transportation facilities, this part will be amended to include those provisions.

Subpart E -- Enforcement

Because the Department of Justice does not have authority to establish procedures for judicial review and enforcement, subpart E generally restates the statutory procedures for enforcement.

Section 36.501 describes the procedures for private suits by individuals and the judicial remedies available. In addition to the language in section 308(a)(1) of the Act, Sec.36.501(a) of this part includes the language from section 204(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000a - 3(a)) which is incorporated by reference in the ADA. A commenter noted that the proposed rule did not include the provision in section 204(a) allowing the court to appoint an attorney for the complainant and authorize the commencement of the civil action without the payment of fees, costs, or security. That provision has been included in the final rule.

Section 308(a)(1) of the ADA permits a private suit by an individual who has reasonable grounds for believing that he or she is "about to be" subjected to discrimination in violation of section 303 of the Act (subpart D of this part), which requires that new construction and alterations be readily accessible to and usable by individuals with disabilities. Authorizing suits to prevent construction of facilities with architectural barriers will avoid the necessity

of costly retrofitting that might be required if suits were not permitted until after the facilities were completed. To avoid unnecessary suits, this section requires that the individual bringing the suit have `reasonable grounds" for believing that a violation is about to occur, but does not require the individual to engage in a futile gesture if he or she has notice that a person or organization covered by title III of the Act does not intend to comply with its provisions.

Section 36.501(b) restates the provisions of section 308(a)(2) of the Act, which states that injunctive relief for the failure to remove architectural barriers in existing facilities or the failure to make new construction and alterations accessible "shall include" an order to alter these facilities to make them readily accessible to and usable by persons with disabilities to the extent required by title III. The Report of the Energy and Commerce Committee notes that "an order to make a facility readily accessible to and usable by individuals with disabilities is mandatory" under this standard. H.R. Rep. No. 485, 101st Cong., 2d Sess, pt 4, at 64 (1990). Also, injunctive relief shall include, where appropriate, requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by title III of the Act and this part.

Section 36.502 is based on section 308(b)(1)(A)(i) of the Act, which provides that the Attorney General shall investigate alleged violations of title III and undertake periodic reviews of compliance of covered entities. Although the Act does not establish a comprehensive administrative enforcement mechanism for investigation and resolution of all complaints received, the legislative history

notes that investigation of alleged violations and periodic compliance reviews are essential to effective enforcement of title III, and that the Attorney General is expected to engage in active enforcement and to allocate sufficient resources to carry out this responsibility. Judiciary Report at 67.

Many commenters argued for inclusion of more specific provisions for administrative resolution of disputes arising under the Act and this part in order to promote voluntary compliance and avoid the need for litigation. Administrative resolution is far more efficient and economical than litigation, particularly in the early stages of implementation of complex legislation when the specific requirements of the statute are not widely understood. The Department has added a new paragraph (c) to this section authorizing the Attorney General to initiate a compliance review where he or she has reason to believe there may be a violation of this rule.

Section 36.503 describes the procedures for suits by the Attorney General set out in section 308(b)(1)(B) of the Act. If the Department has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by title III or that any person or group of persons has been denied any of the rights granted by title III and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court. The proposed rule provided for suit by the Attorney General "or his or her designee." The reference to a "designee" has been omitted in the final rule because it is unnecessary. The Attorney General has delegated enforcement authority under the ADA

to the Assistant Attorney General for Civil Rights. 55 FR 40653 (October 4, 1990) (to be codified at 28 CFR 0.50(l).)

Section 36.504 describes the relief that may be granted in a suit by the Attorney General under section 308(b)(2) of the Act. In such an action, the court may grant any equitable relief it considers to be appropriate, including granting temporary, preliminary, or permanent relief, providing an auxiliary aid or service, modification of policy or alternative method, or making facilities readily accessible to and usable by individuals with disabilities, to the extent required by title III. In addition, a court may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved, when requested by the Attorney General.

Furthermore, the court may vindicate the public interest by assessing a civil penalty against the covered entity in an amount not exceeding $50,000 for a first violation and not exceeding $100,000 for any subsequent violation. Section 36.504(b) of the rule adopts the standard of section 308(b)(3) of the Act. This section makes it clear that, in counting the number of previous determinations of violations for determining whether a "first" or "subsequent" violation has occurred, determinations in the same action that the entity has engaged in more than one discriminatory act are to be counted as a single violation. A "second violation" would not accrue to that entity until the Attorney General brought another suit against the entity and the entity was again held in violation. Again, all of the violations found in the second suit would be cumulatively considered as a "subsequent violation."

Section 36.504(c) clarifies that the terms "monetary damages" and "other relief" do not include punitive damages. They do include, however, all forms of compensatory damages, including out-of-pocket expenses and damages for pain and suffering.

Section 36.504(a)(3) is based on section 308(b)(2)(C) of the Act, which provides that, "to vindicate the public interest," a court may assess a civil penalty against the entity that has been found to be in violation of the Act in suits brought by the Attorney General. In addition, Sec.36.504(d), which is taken from section 308(b)(5) of the Act, further provides that, in considering what amount of civil penalty, if any, is appropriate, the court shall give consideration to "any good faith effort or attempt to comply with this part." In evaluating such good faith, the court shall consider "among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability."

The "good faith" standard referred to in this section is not intended to imply a willful or intentional standard --that is, an entity cannot demonstrate good faith simply by showing that it did not willfully, intentionally, or recklessly disregard the law. At the same time, the absence of such a course of conduct would be a factor a court should weigh in determining the existence of good faith.

Section 36.505 states that courts are authorized to award attorneys fees, including litigation expenses and costs, as provided in section 505 of the Act. Litigation expenses include items such as expert witness fees, travel expenses,

etc. The Judiciary Committee Report specifies that such items are included under the rubric of "attorneys fees" and not "costs" so that such expenses will be assessed against a plaintiff only under the standard set forth in Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978). (Judiciary report at 73.)

Section 36.506 restates section 513 of the Act, which encourages use of alternative means of dispute resolution. Section 36.507 explains that, as provided in section 506(e) of the Act, a public accommodation or other private entity is not excused from compliance with the requirements of this part because of any failure to receive technical assistance.

Section 36.305 Effective Date

In general, title III is effective 18 months after enactment of the Americans with Disabilities Act, i.e., January 26, 1992. However, there are several exceptions to this general rule contained throughout title III. Section 36.508 sets forth all of these exceptions in one place.

Paragraph (b) contains the rule on civil actions. It states that, except with respect to new construction and alterations, no civil action shall be brought for a violation of this part that occurs before July 26, 1992, against businesses with 25 or fewer employees and gross receipts of $1,000,000 or less; and before January 26, 1993, against businesses with 10 or fewer employees and gross receipts of $500,000 or less. In determining what constitutes gross receipts, it is appropriate to exclude amounts collected for sales taxes.

Paragraph (c) concerns transportation services provided by public accommodations not primarily engaged in the business of transporting people. The 18-month effective date applies to all of the transportation provisions except those requiring newly purchased or leased vehicles to be accessible. Vehicles subject to that requirement must be accessible to and usable by individuals with disabilities if the solicitation for the vehicle is made on or after August 26, 1990.

Subpart F -- Certification of State Labs or Local Building Codes

Subpart F establishes procedures to implement section 308(b)(1)(A)(ii) of the Act, which provides that, on the application of a State or local government, the Attorney General may certify that a State law or local building code or similar ordinance meets or exceeds the minimum accessibility requirements of the Act. In enforcement proceedings, this certification will constitute rebuttable evidence that the law or code meets or exceeds the ADA's requirements.

A definition of "model code" has been added in light of new Sec.36.608.

Many of the comments received from business organizations, as well as those from some individuals and disability rights groups, addressed the relationship of the ADA requirements and their enforcement, to existing State and local codes and code enforcement systems. These commenters urged the Department to use existing

code-making bodies for interpretations of the ADA, and to actively participate in the integration of the ADA into the text of the national model codes that are adopted by State and local enforcement agencies. These issues are discussed in preamble section 36.406 under General comments.

Many commenters urged the Department to evaluate or certify the entire code enforcement system (including any process for hearing appeals from builders of denials by the building code official of requests for variances, waivers, or modifications). Some urged that certification not be allowed in jurisdictions where waivers can be granted, unless there is a clearly identified decision-making process, with written rulings and notice to affected parties of any waiver or modification request. One commenter urged establishment of a dispute resolution mechanism, providing for interpretation (usually through a building official) and an administrative appeals mechanism (generally called Boards of Appeal, Boards of Construction Appeals, or Boards of Review), before certification could be granted.

The Department thoroughly considered these proposals but has declined to provide for certification of processes of enforcement or administration of State and local codes. The statute clearly authorizes the Department to certify the codes themselves for equivalency with the statute; it would be ill-advised for the Department at this point to inquire beyond the face of the code and written interpretations of it. It would be inappropriate to require those jurisdictions that grant waivers or modifications to establish certain procedures before they can apply for certification, or to insist that no deviations can be permitted. In fact, the Department expects that many jurisdictions will allow slight

variations from a particular code, consistent with ADAAG itself. ADAAG includes in Sec.2.2 a statement allowing departures from particular requirements where substantially equivalent or greater access and usability is provided. Several sections specifically allow for alternative methods providing equivalent facilitation and, in some cases, provide examples. (See, e.g., section 4.31.9, Text Telephones; section 7.2(2)(iii), Sales and Service Counters.) Section 4.1.6 includes less stringent requirements that are permitted in alterations, in certain circumstances.

However, in an attempt to ensure that it does not certify a code that in practice has been or will be applied in a manner that defeats its equivalency with the ADA, the Department will require that the submitting official include, with the application for certification, any relevant manuals, guides, or any other interpretive information issued that pertain to the code. (Sec.36.603(c)(1).) The requirement that this information be provided is in addition to the NPRM's requirement that the official provide any pertinent formal opinions of the State Attorney General or the chief legal officer of the jurisdiction.

Section 36.607 addresses the effect of certification. First, certification will only be effective concerning those features or elements that are both (1) covered by the certified code and (2) addressed by the regulations against which they are being certified. For example, if children's facilities are not addressed by the Department's standards, and the building in question is a private elementary school, certification will not be effective for those features of the building to be used by children. And if the Department's regulations addressed equipment but the local code did not, a building's equipment

would not be covered by the certification.

In addition, certification will be effective only for the particular edition of the code that is certified. Amendments will not automatically be considered certified, and a submitting official will need to reapply for certification of the changed or additional provisions.

Certification will not be effective in those situations where a State or local building code official allows a facility to be constructed or altered in a manner that does not follow the technical or scoping provisions of the certified code. Thus, if an official either waives an accessible element or feature or allows a change that does not provide equivalent facilitation, the fact that the Department has certified the code itself will not stand as evidence that the facility has been constructed or altered in accordance with the minimum accessibility requirements of the ADA. The Department's certification of a code is effective only with respect to the standards in the code; it is not to be interpreted to apply to a State or local government's application of the code. The fact that the Department has certified a code with provisions concerning waivers, variances, or equivalent facilitation shall not be interpreted as an endorsement of actions taken pursuant to those provisions.

The final rule includes a new Sec.36.608 concerning model codes. It was drafted in response to concerns raised by numerous commenters, many of which have been discussed under General comments (Sec.36.406). It is intended to assist in alleviating the difficulties posed by attempting to certify possibly tens of thousands of codes. It is included in recognition of the fact that many codes are based on, or

incorporate, model or consensus standards developed by nationally recognized organizations (e.g., the American National Standards Institute (ANSI); Building Officials and Code Administrators (BOCA) International; Council of American Building Officials (CABO) and its Board for the Coordination of Model Codes (BCMC); Southern Building Code Congress International (SBCCI)). While the Department will not certify or "precertify" model codes, as urged by some commenters, it does wish to encourage the continued viability of the consensus and model code process consistent with the purposes of the ADA.

The new section therefore allows an authorized representative of a private entity responsible for developing a model code to apply to the Assistant Attorney General for review of the code. The review process will be informal and will not be subject to the procedures of Sec..36.602 through 36.607. The result of the review will take the form of guidance from the Assistant Attorney General as to whether and in what respects the model code is consistent with the ADA's requirements. The guidance will not be binding on any entity or on the Department; it will assist in evaluations of individual State or local codes and may serve as a basis for establishing priorities for consideration of individual codes. The Department anticipates that this approach will foster further cooperation among various government levels, the private entities developing standards, and individuals with disabilities.

PUBLICATIONS
DEPARTMENT OF JUSTICE

Certification of State and local Building Codes

Code Certification

Title III of the ADA, which covers public accommodations and commercial facilities (most private businesses and non-profit service providers), recognizes the role that building codes may play to ensure compliance with the building-related aspects of accessibility. Title III authorizes the Department of Justice (DOJ) to certify that State laws, local building codes, or similar ordinances meet or exceed the accessibility requirements for new construction and alterations under title III. In ADA litigation, compliance with a certified code constitutes rebuttable evidence of compliance with title III of the ADA. But the significance of certification extends far beyond litigation.

Why is Certification Important?

A major part of the effort to implement the ADA relies on voluntary compliance by businesses. Code certification facilitates voluntary compliance by putting ADA requirements and local requirements into a single, readily available document. It allows builders to rely on their local inspection and approval processes, and it ensures

that accessibility will be routinely considered in those processes. It allows builders to be assured of compliance through inspections early in the construction process, when mistakes can be corrected relatively easily and cost-effectively. It eliminates conflicts between local requirements and ADA requirements. Finally, by incorporating ADA-equivalent accessibility provisions into the local code, certification gives building officials a significant role in enforcing the substance of the ADA. By meshing local processes with Federal requirements, certification makes accessibility part of the process, not an afterthought.

The Certification Process

The title III regulations (28 CFR §§ 36.601 et seq.) provide a detailed description of the process to obtain certification. In general, the process contains the following steps:

- the jurisdiction must provide public notice of the intent to seek certification;
- certification must be discussed at a public hearing, which is on the record;
- copies of the certification request must be available for public inspection and copying;
- the submission to the DOJ must include the code plus supporting documents;
- the DOJ reviews the submission using a side-by-side form which is available on disk;
- the DOJ issues a preliminary determination;
- if the code is equivalent, the DOJ solicits public comments in writing and at public hearings;
- after reviewing the public comments, the DOJ issues a

final determination of equivalency;
- if found not equivalent, then the submitting official has 15 days to oppose determination;

Technical Assistance

Technical assistance and a blank side-by-side comparison form is available from the ADA Information Line .

Status

On March 29, 1995, the DOJ certified that the State of Washington State Regulations for Barrier-Free Facilities was equivalent to the ADA Standards for Accessible Design.

On Sept 23, 1996, the DOJ certified that the Texas Accessibility Standards meet or exceed the requirements of the ADA Standards for Accessible Design.

On December 12, 1997, the Department certified that the Maine Human Rights Act, as implemented by the Maine Accessibility Regulations, meets or exceeds the new construction and alterations requirments of title III of the ADA.

On May 27, 1998, Acting Assistant Attorney General Bill Lann Lee and Governor Lawton Chiles held a joint press conference in Tallahassee, Florida, to announce that the Department of Justice certified the Florida Accessibility Code for Building Construction.

Eight other jurisdictions, including New Mexico, Minnesota, New Jersey, Maryland, California, Indiana, North Carolina, and the County of Hawaii have also submitted codes for certification review. In addition, DOJ

is reviewing several model codes.

Nationwide - In conjunction with the certification of the Florida Code, the Acting Assistant Attorney General wrote to the Governors of the States that have not yet requested ADA certification of their accessibility codes to encourage them to make their State accessibility codes ADA-equivalent and to seek certification. In these letters, Mr. Lee emphasized the benefits of certification - "By meshing local and Federal requirements, certification will increase the number of accessible buildings and decrease the need for costly litigation."

DISTRICT COURT DECISION

U.S. DISTRICT - N.D. OF N.Y.
FILED
MAR 28 2001
AT _____ O'CLOCK _____
Lawrence K. Baerman, Clerk - Syracuse

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOHN SALVADOR, JR., and
KATHLEEN A. SALVADOR,

Plaintiffs,

- against -

98-CV-1987
(FJS/DRH)

THE LAKE GEORGE pARK COMMISSION, CARL R. DE SANTIS, SR. in his official capacity as Chairman and member of the Lake George Park Commission and in his individual capacity; H. GORDON BURLEIGH, in his official capacity as Vice Chairman and member of the Lake George park Commission and in his individual capacity; MARGARET M. STEWART, in her official capacity as Secretary-Treasurer and member of the Lake George park Commission and in her individual capacity; BRUCE E. YOUNG, in his official capacity as a member of the Lake George park Commission and in his individual capacity; THOMAS L. WOOD, in his

official capacity as a member of the Lake George park Commission and in his individual capacity; JOAN A. ROBERTSON, in her official capacity as a member of the Lake George park Commission and in her individual capacity; E. WILSON CAMPBELL, in his official capacity as a member of the Lake George park Commission and in his individual capacity; JAMES B. NEAL, in his official capacity as a member of the Lake George park Commission and in his individual capacity; ANTHONY P. REALE, in his official capacity as a member of the Lake George park Commission and in his individual capacity; JOHN P. CAHILL, in his official capacity as Commissioner of the Department of Environment Conservation and Ex-officio member of the Lake George park Commission; SANDRA LeBARRON, in her official capacity as official Designee of the Commissioner of the Department Environmental Conservation to the Lake George park Commission, and Department of Environmental Conversation Special Assistant to the Commissioner for the Adirondacks and a member of the Lake George park Commission and in her individual capacity; MICHAEL P. WHITE, in his official capacity as the Executive Director of the Lake George park Commission and in his individual capacity; MOLLY GALLAGHER, in her official capacity as Environmental Analyst of the Lake George park Commission and in her individual capacity; MARTIN AUFFREDOU in his official capacity as Counsel to the Lake George park Commission and in his individual capacity; and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Defendants.

APPEARANCES **OF COUNSEL**

GALVIN and MORGAN
217 Delaware Avenue
Delmar, New York 12054
Attorneys for Plaintiffs

MADELINE SHEILA GALVIN, ESQ.

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK
Department of Law
The Capitol
Albany, New York 12224
Attorneys for Defendants

LAWRENCE A. RAPPOPORT, AAG

BARTLETT, PONTIFF, STEWART & RHODES, P.C.
P.O. Box 2168
One Washington Street
Glens Falls, New York 12801
Attorneys for Defendant Auffredou

RICHARD J. BARTLETT, ESQ.

SCULLIN, Chief Judge

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiffs commenced this action in December 1998 alleging numerous causes of action against numerous Defendants. At this point in litigation, the remaining Defendants are the Lake George Park Commission ("Commission"), the New York State Department of Environmental Conservation ("DEC") and fourteen individual Defendants, who are bing sued in their official capacities, due to their membership in either the Commission or the DEC, and in their individual capacities.

Presently before the Court is Defendants' motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.[1]

II. BACKGROUND

Plaintiffs own a marina ta Dunham's Bay, Lake George, Town of Queensbury, Warren County, New York. In 1982, Plaintiffs received a marina permit from DEC. Thereafter in 1987, pursuant to Environmental Conservation Law § 43-0117(4), the New York State Legislature transferred the DEC's regulatory authority over marinas on Lake George to the Commission, empowering that organization to implement regulations governing marinas and recreational activities on the Lake.

---

[1] All Defendants, with the exception of Defendant Auffredou, moved together in this matter. Defendant Auffredou moves separately yet his papers mirror those of the other Defendants. The Court, therefore, will include Defendant Auffredou in its definition of Defendants.

Section 43-0117(4) provides, in pertinent part, that: "Following the promulgation of such regulations: (a) no person shall construct any dock, wharf, mooring, marina or put any such structure to use without first obtaining a permit from the commission, ..." New York Envtl. Conserv. Law § 43-0117(4)(McKinney's 1997). That section also provides that the existing DEC regulations would continue in effect until the Commission adopted its own regulations pursuant to § 43-0117(4). The Commission adopte its regulations effective June 3, 1988. The Commission maintains that its adoption of such regulations superseded the DEC's previous regulations.

The procedural and factual histories of this matter are rather complex, and the parties have initiated numerous state court proceedings. At present, it appears that a limited temporary restraining order has been issued, prohibiting Plaintiffs from constructing Handicap accessible facilities at their marina. The state court action, as of the dat the parties filed their motion papers was still pending.

III. DISCUSSION

A. Eleventh Amendment Sovereign Immunity

Plaintiffs seek compensatory and punitive damages against the Commission, the DEC, and each of the individual Defendants in their official capacities. The law is clear, however, that such relief is not available in an action brought by a citizen against a state or its agency. See, e.g., Alden v. Maine, 527 U.S. 706, 709 (1999). Courts have consistently interpreted the Eleventh Amendment as implicitly providing the States with immunity from suits initiated by their own citizens. See Kilcullen v. New York State Dep't of Labor, 205

F.3d 77, 79 (2d Cir. 2000) (citing Seminole Tribe of Florida v. Fla., 517 U.S. 44, 54, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); Hans v. Louisiana, 134 U.S. 1, 16-19, 10 S.Ct. 504, 33 L.Ed.842 (1890)). Moreover, state agencies that act as arms of the state are entitled to the same sovereign immunity as the state. See, e.g., Baker v. Dep't of Envt'l. Conservation of the State of N.Y., 634 F. Supp. 1460, 1462-63 (N.D.N.Y. 1986); see also Komlosi v. New York State Office of Mental Retardation and Developmental Disabilities, 64 F.3d 810, 814-15 (2d Cir. 1995); Atlantic Healthcare Benefits Trust v. Googins, 2 F.3d 1, 4 (2d Cir. 1993) (citing Alabama v. Pugh, 438 U.S. 781, 89 S.Ct. 3057, 57 L.Ed.2d 1114 (1978) (Eleventh Amendment "bars suits against a state agency, . . . , absent a waiver of sovereign immunity").

In this case, it is undisputed that both the Commission and the DEC act as agencies of the state in developing and enforcing environmental laws and, therefore, they are entitled to the same sovereign immunity as the state itself.[2]

Likewise, the protections of the Eleventh Amendment extend to state officials acting in their official capacities. See, e.g., Edelman v. Jordan, 415 U.S. 651, 676-677 (1974); see also Hirsh v. Justices of the Supreme Court of Cal., 67 F.3d 708, 715 (9th Cir. 1995) (sovereign "immunity extends to the individual defendants acting in their official capacities")(citations omitted). When the relief sought, here monetary relief, "would in fact operate against the State, then the action must

---

[2] "The DEC [and the Commission] perform[ ] . . . essential governmental function[s] in managing state lands; consequently, in this action, the State itself is the real party in interest." Baker, 634 F. Supp. at 1463 (citations omitted).

be characterized as one brought against the State." Baker, 634 F. Supp at 1463 (citation omitted); see also New York City Health & Hosps. Corp. v. Perales, 50 F.3d 129, 134 (2d Cir 1995) (citation omitted). Since this suit against the individual Defendants, in their official capacities is essentially a suit against the State, the individual Defendants in their official capacities, are entitled to Eleventh Amendment immunity.

Since the Commission, the DEC, and the individual Defendants in their official capacities are clearly entitled to rely upon the defense of sovereign immunity, they may be sued only if they have waived that immunity or if Congress has clearly abrogated that immunity. There is no indication in the record before the Court that Defendants have waived immunity in this matter. In fact, Defendants raised sovereign immunity as an affirmative defense in their answer to Plaintiffs' amended complaint and actively pursued that defense on this motion.

Furthermore, the majority of Plaintiffs' causes of action are seemingly raised pursuant to § 1983. The United States Supreme Court has expressly held that Congress did not intend 42 U.S.C. § 1983 to abrogate the sovereign immunity of states. See Quren v. Jordan, 440 U.S. 332, 341 (1979). Plaintiffs do not specifically challenge this legal assertion with respect to the first through twelfth and fourteenth causes of action. Therefore, Plaintiffs' claims against the Commission, the DEC, and the individual Defendants, in their official capacities, are barred by the Eleventh Amendment's grant of sovereign immunity.

Plaintiffs, however, argue that their amended complaint alleges causes of action that do not provide Defendants with Eleventh Amendment immunity.

Specifically, Plaintiffs allege that their Thirteenth Cause of Action, in part, is brought pursuant to § 12203(a) and (b) of the Americans with Disabilities Act ("ADA"). Plaintiffs maintain that immunity is not available under the ADA and, therefore, the question of whether the regulations imposed are lawful cannot be resolved on a motion to dismiss.

The Court notes that Plaintiffs' Thirteenth Cause of Action, while rather lengthy, fails to allege any cause of action clearly. Although Plaintiffs do make three passing references to the ADA, they fail to specify what particular provisions of that act are applicable.[3] Moreover, the final paragraphs of that cause of action seem to assert issues of res judicata and collateral estoppel regarding and earlier state court order involving the issues raised here and make no mention of the ADA.

The Court questions whether Plaintiff's [*sic.*] thirteenth cause of action is sufficiently pled to meet even the lenient requirements of Rule 8 of the Federal Rules of Civil Procedure. However, assuming *arguendo* that Plaintiffs have properly pled a cause of action under the ADA, the Court still finds that sovereign immunity bars this suit. Recently, the Supreme Court, in Board of Trustees of the Univ. of Ala. v. Garrett, 121 S. Ct. 955 (2001), held that suits against a state for monetary damages under Title 1, of the ADA are barred by the Eleventh

---

[3] The Court notes that Plaintiffs also refer to Title VII of the Civil Rights Act of 1964, which seemingly has no bearing on this case.

Amendment.[4] See id. at 968. In finding that Title I of the ADA did not meet this requirements [*sic.*], the Court found that the legislative history of the ADA does not demonstrate that Congress was concerned with the states engaging in a pattern of unconstitutional employment discrimination. See id. at 965-66.

While it is unclear from Plaintiffs' amended complaint precisely how they are invoking the ADA, Plaintiffs allege in their memorandum of law that Defendants have violated §§ 12203(a) and (b) of the ADA by interfering with Plaintiffs' attempts to comply with the ADA's requirements.

Plaintiffs do not cite any legal authority for applying this section to a state. In any event, the Court, in light of the Supreme Court's reasoning in Garrett, declines to find that the state may be sued under those provisions of the ADA. There is not indication that Congress, in passing §§ 12203(a) and (b) of the ADA, was concerned with a pattern or practice of states interfering with others' compliance with the mandates of the ADA. Those sections of the ADA, therefore, cannot apply to states for to do so would unlawfully abrogate their sovereign immunity.

In sum, the Court concludes that Eleventh Amendment sovereign immunity bars all of Plaintiffs' claims against the Commission, the DEC, and the individual Defendants in their official capacities. Accordingly, the Court grants Defendants'

---

[4] The Court declined to address whether Title II, the public entity provisions of the ADA was a proper abrogation of state sovereign immunity. See Garrett, 121 S.Ct. at 960 n. 1.

motions for judgment on the pleadings and dismisses Plaintiffs' amended complaint, in its entirety, as alleged against those Defendants.

B. Qualified Immunity

Defendants assert that the individual Defendants are entitled to qualified immunity for any actions they took with respect to Plaintiffs. See Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982). The doctrine of qualified immunity shields government officials from liability when they are performing their discretionary official functions. See, e.g., Ying Jing Gan v. City of New York, 996 F.2d 522, 531 (2d Cir. 1993). In order to defeat Defendants' qualified immunity defense, Plaintiffs must show that Defendants violated a right that was clearly established at the time the alleged violation occurred. See Anderson v. Creighton, 483 U.S. 635, 640 (1987).

As the Second Circuit has stated "'[a] right is "clearly established" if "[t]he contours of the right [are] sufficiently clear" 'in the context of the alleged violation such' "that a reasonable official would understand that what he is doing violates that right."'" Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 250-51 (2d Cir. 1998) (internal citation omitted)). In other words, "a court must consider 'not what a lawyer would learn or intuit from researching case law, but what a reasonable person [in the government actor's] position should know' about the appropriateness of his conduct under federal law." Id. (quoting Young v. County of Fulton, 160 F.3d 899 (2d Cir. 1998)) (other citations omitted).

In the present case, Plaintiffs maintain that immunity[5] does not protect Defendants since Defendants' consistent, selective enforcement against Plaintiffs requires a finding that Defendants knowingly violated Plaintiffs' rights. Despite this conclusory allegation, Plaintiffs have failed to identify, with the required degree of specificity, the clearly established right that Defendants have violated. See, e.g., Komlosi, 64 F.3d at 816. Moreover, to the extent that this conclusory allegation can be construed as a claim that the individual Defendants were hostile toward them, this argument must fail. The defense of qualified immunity is based on whether an official's acts were objectively reasonable and not on that official's subjective motivation. See Crawford-El v. Britton, 523 U.S. 574, 588-89 (1998). Thus, the motivation of the individual official is irrelevant to the determination of whether he is entitled to qualified immunity for his actions. See Sound Aircraft Servs., Inc., v. Town of E. Hampton, 192 F.3d 329, 334 (2d Cir. 1999); see also Fry v. McCall, No. 95 Civ. 1915, 1998 WL 770563, *9 (S.D.N.Y. Nov. 4, 1998) (finding that a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was improperly motivated)(citation omitted)). Finally, even assuming Plaintiffs had asserted that Defendants' conduct in applying the Commission's regulations to Plaintiffs' marina operation violated a clearly established right, Defendants would, nonetheless, be entitled to qualified immunity because Plaintiffs have failed to demonstrate that a reasonable official in Defendants' position would have Commission's regulations to Plaintiffs' marina operations.

---

[5] Plaintiffs merge the concepts of sovereign immunity and qualified immunity in their memorandum of law. Plaintiffs tem this argument as sovereign immunity, but the Court assumes they are referring to qualified immunity`

Accordingly, the Court grants Defendants' motion for judgment on the pleadings and dismisses Plaintiffs' amended complaint against Defendants in their individual capacities.[6]

IV. CONCLUSION

After carefully reviewing the file, the parties' submissions and the relevant law, and for the reasons stated herein, it is hereby

ORDERED that Defendants' motion for judgment on the pleadings is **GRANTED**; and it is further

ORDERED that Defendant Auffredou's motion for judgment on the pleadings is **GRANTED**; and it is further

ORDERED that the Clerk of the Court enter judgment for Defendants and close this case.

---

[6] The Court notes that the Second Circuit has applied the qualified immunity defense to actions arising under the Rehabilitation Act, 29 U.S.C. § 794, the precursor to the ADA. See P.C. v. McLaughlin, 913 F.2d 1033, 1042 (2d Cir. 1990). The Court, therefore, concludes that the defense is also available under the ADA. Likewise, the Supreme Court has acknowledged this defense in § 1983 actions. See Johnson, 239 F.3d at 250 (citations omitted).

AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOHN SALVADOR, JR., and
KATHLEEN A. SALVADOR,

AMENDED

Plaintiffs, COMPLAINT
98-CV-1987

- against - **TRIAL BY JURY**
IS DEMANDED

THE LAKE GEORGE pARK COMMISSION, CARL R. DE SANTIS, SR. in his official capacity as Chairman and member of the Lake George Park Commission and in his individual capacity; H. GORDON BURLEIGH, in his official capacity as Vice Chairman and member of the Lake George park Commission and in his individual capacity; MARGARET M. STEWART, in her official capacity as Secretary-Treasurer and member of the Lake George park Commission and in her individual capacity; BRUCE E. YOUNG, in his official capacity as a member of the Lake George park Commission and in his individual capacity; THOMAS L. WOOD, in his official capacity as a member of the Lake George park Commission and in his individual capacity; JOAN A. ROBERTSON, in her official capacity as a member of the Lake George park Commission and in her individual capacity; E. WILSON CAMPBELL, in his official capacity as a member of the Lake George park Commission and in his individual capacity; JAMES B. NEAL, in his official capacity as a member of

the Lake George park Commission and in his individual capacity; ANTHONY P. REALE, in his official capacity as a member of the Lake George park Commission and in his individual capacity; JOHN P. CAHILL, in his official capacity as Commissioner of the Department of Environment Conservation and Ex-officio member of the Lake George park Commission; SANDRA LeBARRON, in her official capacity as official Designee of the Commissioner of the Department Environmental Conservation to the Lake George park Commission, and Department of Environmental Conversation Special Assistant to the Commissioner for the Adirondacks and a member of the Lake George park Commission and in her individual capacity; MICHAEL P. WHITE, in his official capacity as the Executive Director of the Lake George park Commission and in his individual capacity; MOLLY GALLAGHER, in her official capacity as Environmental Analyst of the Lake George park Commission and in her individual capacity; MARTIN AUFFREDOU in his official capacity as Counsel to the Lake George park Commission and in his individual capacity; and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Defendants.

PARTIES

1. At all times hereinafter mentioned, Plaintiffs, JOHN SALVADOR, JR. and KATHLEEN A. SALVADOR, hereinafter referred to as Plaintiffs, were and are citizens of the United States, State of New York, County of Warren and Town of Queensbury.

2. At all times hereinafter mentioned, Plaintiffs were and are residents of the United States, State of New York,

County of Warren and Town of Queensbury.

3. At all times hereinafter mentioned, Plaintiffs were and are property owners in the United States, State of New York, County of Warren and Town of Queensbury.

4. At all times hereinafter mentioned, Plaintiffs were and are taxpayers in the United States, State of New York, County of Warren and Town of Queensbury.

5. At all times hereinafter referred to Defendant LAKE GEORGE pARK COMMISSION, hereinafter referred to as the "LGpC", was and is a governmental entity created by act of the New York State Legislature by Chapter 454 of the Laws of 1961.

6. At all times hereinafter mentioned, Defendant LGpC was and is a special agency within the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION.

7. At all times hereinafter mentioned, Defendant LGpC was and is a commission having authority only as defined by New York State statute.

8. At all times hereinafter mentioned, Defendant LGpC was and is a part of the Executive Branch of the government of the State of New York by its inclusion within the Department of Environmental Conservation which is an arm of the Executive Branch.

9. Upon information and belief, at all times hereinafter mentioned, Defendant LGpC was and is a governmental entity within the State of New York.

10. Upon information and belief, at all times hereinafter mentioned, pursuant to Section 43-0105 of the New York State Environmental Conservation Law, hereinafter referred to as the "Environmental Conservation Law", the appointment of members to the LGpC was and is made by the Governor of the State of New York.

11. Upon information and belief, at all times hereinafter mentioned, the appointment of members to the LGpC was and is handled through the appointments office of the Governor of the State of New York.

12. Upon information and belief, at all times hereinafter mentioned, the appointment of members of the LGpC were approved by the New York State Senate as provided in Section 43-0105 of the Environmental Conservation Law.

13. According to the provisions of Section 43-0105 of the Environmental Conservation Law, the LGpC is to be composed of the Commissioner of the Department of Environmental Conservation and nine (9) members.

14. Also according to the provisions of Section 43-0105, the appointment of members by the Governor with the advice and consent of the Senate is to include the following, ". . . at least two of whom shall reside in the county of Essex, two in the county of Warren and two in the county of Washington and at least three of whom shall be members of a civic, protective or service association in the Lake George area."

15. Upon information and belief, at all times relevant, Defendant CARL R. DE SANTIS, SR., hereinafter referred to as "De Santis", was and is Chairman of the LGpC.

16. Upon information and belief, at all times hereinafter mentioned, Defendant De Santis now is a resident of the State of New York, County of Warren, Town of Bolton.

17. Upon information and belief, at all times hereinafter mentioned prior to 1998, Defendant De Santis was a resident of the State of New York, County of Warren, Town of Lake George.

18. Upon information and belief, at all times

hereinafter mentioned, Defendant MARGARET M. STEWART, hereinafter referred to as "Stewart" was and is a member of Defendant LGpC.

19. Upon information and belief, at all times hereinafter mentioned relevant to the instant Complaint, Defendant Stewart was and is the Secretary/Treasurer of Defendant LGpC.

20. Upon information and belief, at all times hereinafter mentioned, Defendant Stewart was and is a resident of the State of New York, County of Warren, Town of Queensbury.

21. Upon information and belief, at all times hereinafter mentioned and relevant to the instant Complaint, Defendant H. GORDON BURLEIGH, hereinafter referred to as "Burleigh" was and is a member of the LGpC.

22. Upon information and belief, at all times hereinafter mentioned, Defendant Burleigh was and is the Vice-Chairman of Defendant LGpC.

23. Upon information and belief, following the reorganization of Defendant LGpC Defendant Burleigh served as acting Chairman of Defendant LGpC between the time at which William Hennessy served as Chairman and the time at which the nomination of Defendant De Santis was approved and Defendant De Santis commenced serving as Chairman of Defendant LGpC.

24. Upon information and belief, at all times hereinafter mentioned, Defendant Burleigh was and is a resident of the State of New York, County of Essex, Town of Ticonderoga.

25. Upon information and belief, at all times hereinafter mentioned and relevant to the instant Complaint, Defendant JOAN A. ROBERTSON, hereinafter referred to as "Robertson" was and is a member of

Defendant LGpC.

26. Upon information and belief, at all times hereinafter mentioned, Defendant Robertson was and is a resident of the State of New York, County of Warren, Town of Queensbury.

27. Upon information and belief, at times hereinafter mentioned, Defendant Robertson was and is the wife of the former Chairman of the Warren County Board of Supervisors.

28. Upon information and belief, Defendant Robertson was the wife of the person who served as the Chairman of the Warren County Board of Supervisors at the time at which Chapter 617 of the Laws of 1987 was enacted by the New York State Legislature and approved by the Governor.

29. Upon information and belief, at all times hereinafter mentioned and relevant to the instant Complaint, Defendant Bruce E. Young, hereinafter referred to as "Young" was and is a member of Defendant LGpC.

30. Upon information and belief, at all times hereinafter mentioned, Defendant Young was and is a resident of the State of New York, County of Washington, Town of Dresden.

31. Upon information and belief, at all times hereinafter mentioned and relevant to the instant Complaint, Defendant THOMAS L. WOOD, hereinafter referred to as "Wood" was and is a member of Defendant LGpC.

32. Upon information and belief, at all times hereinafter mentioned, Defendant Wood was and is a resident of the State of New York, County of Washington, Town of Dresden.

33. Upon information and belief, at all times

hereinafter mentioned and relevant to the instant Complaint, Defendant E. WILSON CAMPBELL, hereinafter referred to as "Campbell" was and is a member of Defendant LGpC.

34. Upon information and belief, at all times hereinafter mentioned, Defendant Campbell was and is a resident of the State of New York, County of Warren, Town of Bolton.

35. Upon information and belief, at all times hereinafter mentioned and relevant to the instant Complaint, Defendant JAMES B. NEAL, hereinafter referred to as "Neal" was and is a member of Defendant LGpC.

36. Upon information and belief, at all times hereinafter mentioned, Defendant Neal was and is a resident of the State of New York, County of Warren, Town of Hague.

37. Upon information and belief, at all times hereinafter mentioned and relevant to the instant Complaint, Defendant ANTHONY P. REALE, hereinafter referred to as "Reale" was and is a member of Defendant LGpC.

38. Upon information and belief, at all times hereinafter mentioned, Defendant Reale was and is a resident of the State of New York, County of Essex, Town of Ticonderoga.

39. Upon information and belief, at certain times relevant to the instant complaint, hereinafter mentioned, Defendant JOHN P. CAHILL, hereinafter referred to as the "ENCON Commissioner", was and is the Commissioner of the Department of Environmental Conservation.

40. Upon information and belief, at certain times relevant to the instant complaint, Defendant ENCON Commissioner was and is an ex-officio member of

Defendant LGpC.

41. Upon information and belief, at certain times relevant to the instant complaint, Defendant ENCON Commissioner was entitled to designate a representative to act for him in his ex-officio capacity as an ex-officio member of Defendant LGpC.

42. Upon information and belief, at all times hereinafter mentioned and relevant to the instant Complaint commencing on or after 1994, Defendant SANDRA LeBARRON, hereinafter referred to as "LeBarron", was and is the Designee of Defendant ENCON Commissioner an ex-officio member of Defendant LGpC.

43. Upon information and belief, at all times hereinafter mentioned and relevant to the instant Complaint in and prior to 1994, Thomas Monroe, Region V Director for ENCON was the Designee of Defendant ENCON Commissioner an ex-officio member of Defendant LGpC.

44. Upon information and belief, at all times hereinafter mentioned, Defendant LeBarron was and is an employee of ENCON.

45. Upon information and belief, at all times hereinafter mentioned, Defendant LeBarron was and is an agent of ENCON.

46. Upon information and belief, at all times hereinafter mentioned, Defendant LeBarron was and is DEC Special Assistant to the ENCON Commissioner for the Adirondacks.

47. Upon information and belief, at all times hereinafter mentioned, Defendant LeBarron was and is a resident of the State of New York, County of Essex.

48. Upon information and belief, at all times hereinafter mentioned and relevant to the instant Complaint, Defendant LeBarron work out of the

Warrensburg office of the DEC.

49. Upon information and belief, at all times hereinafter mentioned, except as specified herein, Defendant MICHAEL P. WHITE, hereinafter referred to as "White" was and is the Executive Director of Defendant LGpC.

50. Upon information and belief, Defendant White became Executive Director of Defendant LGpC effective on or about January 1, 1988.

51. Upon information and belief, at certain times specified herein Defendant White was and is the Secretary of Defendant LGpC.

52. Upon information and belief, from the early 1980's until the end of 1987, Defendant White served as Secretary of Defendant LGpC.

53. Upon information and belief, at certain times specified herein Defendant White held the title of Environmental Analyst with the Department of Environmental Conservation.

54. Upon information and belief, at all times hereinafter mentioned, Defendant White was and is a resident of the State of New York, County of Warren.

55. Upon information and belief, at all times hereinafter mentioned, Defendant White was and is an employee of Defendant LGpC.

56. Upon information and belief, at all times hereinafter mentioned, Defendant White was and is an agent of Defendant LGpC.

57. Upon information and belief, at all times hereinafter mentioned, Defendant MOLLY GALLAGHER, hereinafter referred to as "Gallagher" was and is an employee of Defendant LGpC.

58. At all times hereinafter mentioned Defendant

Gallagher was and is the Environmental Analyst of the LGpC.

59. Upon information and belief, at all times hereinafter mentioned, Defendant Gallagher was and is a resident of the State of New York, County of Warren.

60. Upon information and belief, at all times hereinafter mentioned, Defendant Gallagher was and is an employee of Defendant LGpC.

61. Upon information and belief, at all times hereinafter mentioned, Defendant Gallagher was and is an agent of Defendant LGpC.

62. Upon information and belief, at all times hereinafter mentioned, Defendant MARTIN AUFFREDOU, hereinafter referred to as "Auffredou" was and is the Counsel to Defendant LGpC.

63. Upon information and belief, at all times hereinafter mentioned, Defendant Auffredou was and is an independent contractor for Defendant LGpC.

64. Upon information and belief, at all times hereinafter mentioned, Defendant Auffredou was and is a resident of the State of New York, County of Warren.

65. Upon information and belief, Defendant Auffredou was and is licensed to practice law in the State of New York.

66. Upon information and belief, at all times hereinafter mentioned, Defendant Auffredou was and is an agent of Defendant LGpC.

67. Upon information and belief, at all times hereinafter mentioned, Defendant Auffredou was and is a member of the law firm of BARTLETT, PONTIFF, STEWART and RHODES, P.C., hereinafter referred to as "Bartlett-Pontiff".

68. Upon information and belief, at all times hereinafter mentioned, Defendant Auffredou received compensation from Defendant LGpC through his law firm.

69. Upon information and belief, at all times hereinafter mentioned, Defendant Auffredou accepted compensation from Defendant LGpC through his law firm.

70. Upon information and belief, Defendant Auffredou in his capacity as Counsel to Defendant LGpC acted as a governmental official.

71. Upon information and belief, Defendant Auffredou in his capacity as Counsel to Defendant LGpC acted as a state official.

72. Upon information and belief, Defendant Auffredou was placed on notice and were on notice of the infringement of Plaintiffs' rights involved directly in the conduct of Defendants herein.

73. Despite due notice, those actions were continued by Defendants.

74. Under the existing facts and application of existing purported regulations of Defendant LGpC and other entities, as orchestrated by Defendant Auffredou and other LGpC Defendants the current policy of Defendant LGpC as selectively applied by Defendant Auffredou and the individual Defendant member political appointees of Defendant LGpC, disparate treatment of Plaintiffs in the handling of their existing marina permit and the application which Defendant LGpC, its agents, servants and employees forced Plaintiffs to file with Defendant LGpC.

75. Upon information and belief, the application of purported policies to Plaintiffs herein by Defendant LGpC through the legal interpretation of Defendant Auffredou foster driving Plaintiffs as targeted persons from business in the Lake George area as persons with whom they or their

cohorts disagree or who attempt to assert their Constitutional Rights and civil rights as citizens of the United States.

76. Upon information and belief, Defendants Auffredou and other LGpC Defendants acting under color of state law, individually and in concert, deprived Plaintiffs of their Constitutional and civil rights arising from and by virtue of Plaintiffs' Constitutional and civil rights.

77. Upon information and belief, Defendants Auffredou and other LGpC Defendants acting under color of state law, individually and in concert, deprived Plaintiffs of their contractual rights arising from and by virtue of Plaintiffs' contractual agreements.

78. Upon information and belief, the contract rights derive from Plaintiffs' status as citizens and residents within the territorial limits delineated in Section 43-0103 of the New York State Environmental Conservation Law of Defendant LGpC.

79. Upon information and belief, Defendant Auffredou acting in the capacity as a public officer owed all citizens the fiduciary and contractual duty of in accordance with law and regulation in such a manner as to guarantee each and every citizen their basic Constitutional rights.

80. Upon information and belief, by acting purposefully, individually and in concert in violation of the Constitutional rights of Plaintiffs, Defendant Auffredou has violated Plaintiffs' basic contract rights as citizens and has breached his fiduciary duty acting in the capacity as a public officer.

81. Upon information and belief, similarly, all LGpC Defendants, also acting in their capacities as a public officers owed all citizens the fiduciary and contractual duty of in accordance with law and regulation in such a manner as to guarantee each and every citizen their basic Constitutional

rights.

82. Upon information and belief, all LGpC Defendants, by acting purposefully, individually and in concert in violation of the Constitutional rights of Plaintiffs violated Plaintiffs' basic contract rights as citizens and have breached their fiduciary duty acting in the capacity as a public officers.

83. Upon information and belief, all of the above is in direct derogation of State Law, Rules, Regulations and policy and applicable Federal Law.

84. At all times hereinafter mentioned, Defendant the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, hereinafter referred to as "DEC", was and is a Department within the government of the State of New York.

PLAINTIFFS' PROPERTY

85. By deed dated the 28th day of February, 1973, certain real property more commonly described as land situated in the State of New York, County of Warren, Town of Queensbury, was conveyed by Paul Labiszak and Julia Labiszak into Plaintiffs.

86. Said deed was recorded on the 28th day of February, 1973 in the Office of the Warren County Clerk, in Book 564 of Deeds at page 362.

87. The area in which said real property owned by Plaintiffs is more commonly known as "Dunham Bay" in the North Queensbury area of Defendant Town of Queensbury.

88. Since the date upon which Plaintiffs took title to said premises, Plaintiffs have been taxpayers in Defendant Town of Queensbury and said real property has been taxed

by said municipal entity.

89. By deed dated July 25, 1973, and, upon information and belief, thereafter recorded in the Office of the Warren County Clerk, Plaintiffs conveyed a portion of said real property to the Nature Conservancy.

90. The portion of said property conveyed by Plaintiffs to the Nature Conservancy did not include any lands inundated by the flood waters of Lake George or along the shoreline of Lake George as included in the defined wetland area.

91. Plaintiffs' property was a portion of what previously had been designated as Lot Numbered 11 and 12 of the French Mountain Tract.

92. Lots Numbered 11 and 12 of the French Mountain Tract were the subject of a certain Land Patent appearing in the New York State Archives, State Education Department, in Land Patent Book 27 at page 229, dated December 18, 1818.

93. Said portion of the French Mountain Tract also was depicted in survey dated Spring of 1810, done by Order of Simeon DeWitt, George Webster, Surveyor.

94. By Chapter II of the Laws of the State of New York of 1858, the Civil Divisions of the State were re-established.

95. As part of the re-establishment of the Civil Divisions of the State of New York, the boundaries of Defendant Town of Queensbury were reaffirmed.

96. The boundaries of Defendant Town of Queensbury as set in said re-establishment of Civil Divisions are specified, in pertinent part as follows, ". . . and running thence easterly and northerly along the bounds of Caldwell to Lake George; and then along the east shore of Lake George to the bounds of the county."

97. Thereafter, the Legislature of the State of New York in Legislative Document (1945) No. 67, entitled "Lake George, Complete Report of the New York State Joint Legislative Committee on the Lake George Water Conditions", Revised, March 1945, hereinafter referred to as Document No. 67, relates specifically to the area of Dunham Bay, among others.

98. All of said references and boundaries are critical to the rights of Plaintiffs herein, in establishing jurisdictional claims of the various governmental entities involved in the regulation of Plaintiffs' land and its uses.

99. The above mentioned legislative document, Document No. 67 referred to a survey made by Robert Harpur in 1765 of the Lake George area, said map showing an area of Lake George being identified as Long Island as being one island.

100. Document 67 included reference to a Report of the Forest Commission for 1891 wherein a channel having been cut in Long Island creating South Island is explained.

101. Said Document 67 went on to refer specifically to the Jackson Map of 1756 and states in pertinent part relating to Dunham Bay as follows, "Likewise a comparison of the shore line on the mainland with that of Dunham, Harris and Warner Bays on a modern map suggests that some portions that are now under water were dry land in 1756."

102. Plaintiffs have title to land now inundated by the flood waters of Lake George, the history of how the shore line of Lake George is defined and its relation to the various governmental entities involved in regulatory activities relating thereto, therefore, directly impacts Plaintiffs property rights.

103. The failure of any governmental entity to establish a defined high water mark for Lake George, also

relates directly to the continued inter and intra-governmental over-lapping and conflicting jurisdictions which, in part, has resulted in the damages caused to Plaintiffs and infringement upon their property rights.

104. The measurement of the water level, using the level established at Rogers Rock Gage established a base point for reference.

105. According to Document 67, the level of Lake George at the Rogers Rock Gage in 1894 was 1.31, which according to the conclusion reached in Document 67, indicated that the ". . . original level of the lake during the navigation season was generally not higher than 1.31 on Rogers Rock Gage."

106. The New York State Joint Legislative Committee on Lake George Water Conditions determined that ". . . the mean lake level for the summer season, from June 1, to September 15, for the twenty-nine-year period from 1914-1942 was 3.37."

107. By Chapter 805 of the Laws of 1957 of the State of New York, the legislature authorized the Conservation Commissioner of the State of New York make a survey of Lake George and its shoreline and designate thereon the mean low water mark of the lake.

108. Upon information and belief, said surveying project was conducted.

109. In an article title "Shoreline Survey of Lake George", appearing in the New York State Conservationist, for August-September 1959, authored by Albert T. Davis, Forest Surveyor, it was determined that,

> Following the advice of the Attorney General, the elevation of the mean low water was determined on the basis of the daily readings recorded at the Rogers Rock gage

maintained by the U. S. Geological Survey (this gage is located about a mile north of the actual "Rock" on Stones Bay in the hamlet of Baldwin) for the forty-year period ending in May, 1957. It was found to be at the reading 1.81 feet, equivalent to 317.74 feet above sea level.

The New York State Conservationist, "Shoreline Survey of Lake George" at page 17.

110. At the time at which Plaintiffs purchased said property, said property included an operating marina.

111. From the time that Plaintiffs acquired said real property, Plaintiffs continuously have operated a marina at said location.

Supreme Court, U.S.
FILED
02 350 SEP - 3 2002
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

JOHN SALVADOR, JR. and KATHLEEN A. SALVADOR,

Petitioners,

v.

ADIRONDACK PARK AGENCY OF THE STATE OF NEW YORK,

THE LAKE GEORGE PARK COMMISSION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX - VOLUME III

Madeline Sheila Galvin
Counsel of Record
c/o Galvin and Morgan
217 Delaware Avenue
Delmar, New York 12054
(518) 439-7734
Attorneys for Petitioners

TABLE OF CONTENTS

CIRCUIT COURT OPINION 2a

ORDER DENYING REHEARING 15a

RELEVANT PROVISIONS INVOLVED 16a

VOLUME I:

UNITED STATES CONSTITUTION, ARTICLE III 16a

UNITED STATES CONSTITUTIONAL AMENDMENTS 17a

UNITED STATES CODE 21a

STATE ADMINISTRATIVE PROCEDURE ACT 32a

CODE OF FEDERAL REGULATIONS 51a

ADA ACCESSIBILITY GUIDELINES FOR BUILDINGS AND FACILITIES 102a

VOLUME II:

ADA ACCESSIBILITY GUIDELINES FOR BUILDINGS AND FACILITIES, cont 139a

CERTIFICATION OF STATE AND LOCAL BUILDING CODES 266a

DISTRICT COURT DECISION 270a

APPLICABLE LAWS, RULES AND REGULATIONS; LEGISLATIVE HISTORY; PLAINTIFFS' COMPLIANCE AND PERMITS RECEIVED

112. Upon information and belief, during the 1960 session of the New York State Legislature, certain legislation was proposed for the purpose of creating a Park Commission for Lake George.

113. Upon information and belief, the legislation proposed in the 1960 Legislative session did not pass.

114. Upon information and belief, legislation creating a Commission for the Lake George area again was introduced in the 1961 session of the New York State Legislature.

115. Upon information and belief, said legislation passed and became Chapter 454 of the Laws of 1961.

116. Upon information and belief, the stated legislative intent of said Chapter was to preserve and to develop recreational facilities for "the people".

117. Upon information and belief, said legislation also established "zones".

118. Upon information and belief, said zones were to be included within the physical boundaries of an area which was undefined in said legislation.

119. Upon information and belief, nowhere in said Chapter or previously was a "park" defined.

120. Upon information and belief, in creating the Lake George Park Commission, the powers of such entity related to the designation of the proposed non-commercial "zones".

121. Upon information and belief, contained in the

Bill Jacket for Chapter 454 of the Laws of 1961, L. Judson Morhouse, hereinafter referred to as "Morhouse", in his then capacity as Chairman of the New York State Republican Committee, wrote by Memorandum dated January 25, 1961 to Robert MacCrate stating Morhouse's belief that the method of "zoning", as set forth in Chapter 454 of the Laws of 1961, was "one of the only ways" to achieve the desired regulation of the Lake George area.

122. Upon information and belief, also included in said Bill Jacket was a copy of a letter from Morhouse to Assemblyman R. Wayne Pomeroy referring to said bill as "my baby".

123. Upon information and belief, an typewritten paragraph titled MORHOUSE PLAN and captioned as an excerpt from Adirondack Sportsman by Bill Roden also is contained in the Bill Jacket.

124. Upon information and belief, yet another letter from Morhouse, this dated March 9, 1961, and addressed to then Governor Nelson A. Rockefeller, supported the "final version" of said bill.

125. Upon information and belief, also contained in said Bill Jacket was a newspaper clipping noted as purportedly having been taken from the Sunday, March 28, 1961 Albany Times-Union, which pointed out that Morhouse, described as the "moving force behind" what became Chapter 454 of the Laws of 1961, owned a home located on Lake George on the shore outside Ticonderoga.

126. Upon information and belief, at some time thereafter Morhouse became the Chairman of the Commission as established by Chapter 454 of the Laws of 1961. 127. Upon information and belief, a clear statement of opposition to Chapter 454 of the Laws of 1961 was set forth in a formal Resolution of the Town of Queensbury, formally adopted by the Town Board of that Town.

128. Upon information and belief, said Town was and is directly impacted by such legislation.

129. Upon information and belief, the Town of Queensbury specifically objected top the approval of what became Chapter 454 of the Laws of 1961 in part on the grounds that ". . . the powers and duties of the Commission as set forth in the bill infringe upon the power of the Town t o [sic.] regulate the use of property in the Town of Queensbury in the area described in the bill."

130. Upon information and belief, based upon the content of said Resolution of the Town of Queensbury was sent by said Town to Assemblyman Richard Bartlett and Senator Eustice Pain, the two (2) elected representative whose areas of representation included the Town of Queensbury.

131. Upon information and belief, the State Council of Parks, a part of the Division of Parks within the Conservation Department, by letter dated April 7, 1961, and included in the above mentioned Bill Jacket, also opposed the approval of what became Chapter 454 of the Laws of 1961.

132. Upon information and belief, the zones and zone concept set forth in Chapter 454 of the Laws of 1961 was altered on two (2) occasions by legislative enactments following the original 1961 Chapter Law.

133. Upon information and belief, Defendant DEC derived legislative authority with respect to Lake George by regulation 6 NYCRR Part 646 dated July 3, 1981.

134. Upon information and belief, pursuant to and by the exercise of such apparent authority legislatively granted and delegated to Defendant DEC as a sub-unit of the Executive branch of New York State government, by ECL 3-0301.2, ECL 9-0105.3 and 43-0107.5 (since recodified

as 43-0107.19) DEC required that owners of marina facilities situated on Lake George were required to complete an application for a non-revocable Permit to Operate a Marina "on Lake George".

135. Upon information and belief, as part of the implementation of said requirement Defendant DEC issued a form bearing issuance date in lower left hand corner of "8/81" for that purpose.

136. Upon information and belief, pursuant to the requirements established by DEC each such applicant for the above mentioned Marina permit was to select and specify from a DEC predetermined limited menu of "marina" activities being provided by the entity making application.

137. Upon information and belief, each such responding applicant was required to respond in a timely manner to the DEC to specific questions with respect thereto.

138. Plaintiffs responded to and complied with all the requirements of 6 NYCRR 646 (July 3, 1981).

139. By letter signed by Defendant White then Secretary to Defendant LGpC, dated December 15, 1981, DEC, acknowledged receipt of Plaintiffs' application to operate a marina on Lake George.

140. By notice issued December 16, 1981, the DEC by its agent, White, distributed notification of Plaintiffs' application to other persons and entities, identifying the Salvadors' "Dunham's Bay Lodge" as an "Existing Marina".

141. The above mentioned Notification included notification to Defendant Town of the DEC's intent to issue a Permit to Operate a Marina to Plaintiffs "on Lake George" in the DEC Lake George Recreation Zone (6 NYCRR Part 190.27), as a pre-existing non-conforming use within a

Residential Zone of Defendant Town and within a Vessel Regulation Zone of Defendant Town.

142. Thereafter by Permit Number 50-81-0071 MA, dated March 22, 1982, and duly executed by Permit Administrator Richard A. Wild, the DEC issued to Plaintiffs a non-revocable Marina Permit pursuant to Article 9, Title 1 of the Environmental Conservation Law and the provisions of 6 NYCRR Part 646.

143. Said Marina Permit Application specifically affirmed that the services provided included the sale or rental of watercraft, the sale or rental of marine products, the rental, lease or accommodation for boats and other, etc., 75 parking spaces for vehicles, provision of trash receptacles and rest room facilities, as well as establishing 67 boat slips and one mooring as the vessel berthing capacity, all being maintained and operated at Plaintiffs' facility. (Other activities include boat storage, fuel dispensing, etc.)

144. The resulting non-revocable Marina Permit, incorporating the provisions of the application, recited only in part inclusion, among other things of "Sale or rental of marine products, services and dock space for 67 boats."

145. At this time, the term watercraft as used within the existing 6 NYCRR Part 646 regulation language was encompassed in the defined term "vessel", stating specifically"

> Vessel: means every description of water craft, other than a seaplane, used or capable of being used as a means of transportation on water.

146. The above mentioned definition did not differentiate in any way among the various types of available watercraft, including but not limited to motorized boats, canoes, jetskiis, PWCs of any type or kind, or

sailboats.

147. Plaintiffs, in compliance with their application and with the terms and conditions of the duly issued non-revocable Marina Permit, continuously conducted business at the site specified therein from that time forward to and including the date hereof.

148. Plaintiffs conducted said business in reliance upon the validity of said non-revocable permit and the authority of the DEC to issue such non-revocable Marina Permit as an extension of the legislative grant of authority to the DEC.

149. The regulations set forth in 6 NYCRR Part 646 dated July 3, 1981, established the Lake George Park Recreational Zone Regulations operating on the Lake George Recreation Zone. (6 NYCRR Part 190.27)

150. Defendant DEC's regulations thereby required two (2) separate and different applications, one (1) for the registration of legally pre-existing wharfs and one (1) for the continued operation of a marina.

151. Plaintiffs duly complied with both of the above requirements.

152. The requirement with respect to wharfs, established by Defendant DEC, pursuant to 6 NYCRR Part 646, also required registration of "wharfs legally in existence on Lake George prior to the effective date of the Lake George Recreational Zone Regulation".

153. The provisions of 6 NYCRR Part 646 (July 3, 1981) were promulgated as the Lake George Park Recreation Zone Regulations.

154. The Lake George Recreation Zone did not and does not include private lands.

155. The definition of the "Lake George park" did

and does include within its scope private lands.

156. There exists a clear differentiation between the area and property encompassed by the Lake George Recreation Zone and the Lake George park as set forth and specified by statute.

157. Plaintiffs also duly and timely complied with the requirements of the Lake George Recreational Zone Regulations and by registration form dated November 14, 1981, duly registered their existing wharfs.

158. Defendant DEC acknowledged Plaintiffs' above mentioned wharf registration and issued a confirming letter on April 1, 1982.

159. The Certificate of Registration of said wharfs duly executed by Richard A. Wild was not issued to Plaintiffs until October 14, 1982.

160. In a letter of Charles Hawley letter dated April 1, 1982, at the time at which Hawley as the Chairman of Defendant LGpC, advised that new construction would require a permit from Defendant DEC.

161. Plaintiffs completed all previously DEC authorized wharf construction in its entirety prior to April 1, 1982, the date of the above mentioned Hawley letter.

162. Defendant LGpC was created as an "Independent Agency within the Department", referring to the DEC, pursuant to Chapter 454 of the Laws of 1961.

163. Since the original LGpC entity lacked legislatively granted authority to act, starting in 1962, with the enactment of Chapter 794 of the Laws of 1962, and continuing forward to the present date, Defendant LGpC obtained expansion of the legislative grant of authority given to it.

164. With the reorganization of Defendant DEC in

1972 and the recodification of Article 43 of the Environmental Conservation Law, hereinafter referred to as the "ECL", to include ECL section 43-0117, entitled the "Lake George park Commission", the powers of Defendant LGpC again were expanded.

165. In 1987, with the enactment of Chapter 617 of the Laws of 1987, amending only the Environmental Conservation Law, the Navigation Law, the Vehicle and Traffic Law, and purportedly amending the State Finance Law, the Lake George Park Commission Trust Fund was attempted to be created.

166. Chapter 617 of the Laws of 1987 effectively and substantially impacted numerous areas of regulatory authority not previously related to the scope of legislatively delegated authority of Defendant LGpC.

167. Chapter 617 of the Laws of 1987 expanded the authority of Defendant LGpC to grant to Defendant LGpC powers of zoning regulation and taxation and purportedly established Defendant Trust Fund.

168. Chapter 617 of the Laws of 1987 gave an expansive grant of power and authority to Defendant LGpC.

169. Under the provision of that Chapter, Defendant LGpC even obtained police powers under the auspices of the Vehicle and Traffic law and the Criminal Procedure Law .

170. Chapter 617 of the Law of 1987 with the grant of police powers to Defendant LGpC authorized the arming of Defendant LGpC's employees and agents as Peace Officers.

171. Between Plaintiffs' 1981 application for a Marina Permit with the subsequent issuance of a Marina Permit to Plaintiffs by Defendant DEC, Plaintiffs duly complied with all applicable laws, rules and regulations with respect to their commercial operation on their private

lands and to the extent their operation was on public land, and continue to do so to the date hereof.

172. During the period following the initial grant of authority to Defendant LGpC in the 1987 legislative enactment, Defendant LGpC filed regulations under Subpart 646-2 of Chapter IX, Independent Agencies Within the Department section of the NYCRR relating to Defendant DEC.

173. Said regulations were created with respect to registration of "recreational uses".

174. Those Regulations as noticed and published, as required by statute (Section 5 of Chapter 617 of the Laws of 1987 amended ECL 43-0117), set forth provision for "registration" of all (private and commercial) recreational uses with Defendant LGpC.

175. ECL 43-0117 in its entirety refers to activities on Lake George; i.e., upon the waters of Lake George.

176. The provisions of Subpart 646-2.2 (b) clearly set forth the intent to "grandfather" prior existing commercial and private uses and to provide for a period of two (2) years in which Defendant LGpC could "create" the necessary registration form(s), provide them to pre-existing users, both commercial and private, and allow for their filing on or before June 3, 1988.

177. The "grandfathering" provisions clearly relate to prior existing uses.

178. Absent the "grandfathering" of such prior existing uses the provisions would be subject to challenge and invalidity resulting from implementation of ex-post facto regulation.

179. Subpart 646-2.2 governing the above referred to Registration enumerates a listing of activities included in the items for registration.

180. The history of Subpart 646-2 is significant including the fact that after its original filing May 13, 1988, it was thereafter renumbered to 646-1.6, with Rule Making Activities Publication in the March 6, 1991, State Register, for the stated purpose of amending Subparts 646-1 and 646-2 and repeal of section 646-2.2 and amendment of Subparts 645-3, 645-5 and 645-7 of Title 6 of the NYCRR.

181. The above referenced publication contained reference to the adoption of "Stop gap rules governing certain 'recreational activities' . . . ." by the LGpC on June 3, 1988, the above referenced provisions of Subpart 646-2.

182. The statement in the State Register continued in pertinent part to state that the purported "interim provisions" of Subpart 646-2 were intended ". . . as a means to provide controls over new commercial enterprises involving the specified recreational activities . . . ."

183. This provision only related to commercial and did not in any way deal with non-commercial activities.

184. Continuing, the Notice contained in the State Register went on to state:

> Section 646-2.2 contains definitions of the recreational activities which will be subject to one or more limitations: new recreational activities, parasailing, personal watercraft (trade names jetskiis, wave runners, etc.), scuba diving, seaplanes, tour boats and towing.

185. The State Register went on to elaborate, by way of explanation, as follows:

> Section 646-2.4 establishes permit requirements for any new recreational activity such as a new type of craft not

> previously operated on the waters of Lake George. Under these provisions a new use, such as private submarines, would be subject to review by Defendant LGpC prior to being allowed to operate on Lake George, prior to issuing the permit . . . .

186. The recitations contained in the State Register did not regulate any non-commercial use.

187. Again, continuing, the Notice set forth in the State Register went on to specify:

> Existing operations, that is, tour boats, seaplanes and parasails operated on the lake prior to the effective date of the rules would be granted a permit after an application had been duly filed.

188. When the regulations referred to in the State Register publication ultimately were filed and effective, by their terms, those regulations specified the definition of New Recreational Activity as follows:

> (1) New recreational activity or use means a recreational activity not introduced on the waters of Lake George as of January 1, 1991. [Emphasis Added]

189. By regulation effective August 14, 1991, and contained in Subpart 646-2.4, Special Navigational Rules, Permits, the permitting process with respect to those activities enumerated in Subpart 646-2.3 specifically was limited to ". . . any new recreational activity or use . . . ."

190. Plaintiffs' compliance with Defendant LGpC's original Registration of Recreational Uses, clearly met and by the responses submitted therewith, exceeded in detail the responses required for such registration by Defendant

LGpC.

191. Plaintiffs' filing was both timely under the original provisions of the 1988 regulations of Defendant LGpC and certainly a record of prior existing recreational uses claimed by Plaintiffs as of the January 1, 1991, date establishing a new, extended date for the base-line determination of recreational uses.

192. Nowhere in the regulations as adopted, or in the Notice contained in the State Register was there any language of limitation relating to continuous usage or usage before 1988, between 1988 and 1991, or other specification of such dates of limitation.

193. Plaintiffs first "registered" their recreation uses with the DEC on November 21, 1981.

194. Plaintiffs both met and exceeded the Recreational Uses Registration requirement pursuant to the written request of Defendant White made on behalf of Defendant LGpC, in some cases to the point of redundancy since Plaintiffs already had registered the "Sale or Rental of Watercraft" with Defendant DEC.

195. Plaintiffs relied upon the representations of Registration in the belief that the uses as registered had been accepted by Defendant LGpC Commission and were, therefore, "grandfathered" for any future permitting purposes of Defendant LGpC.

196. Defendant LGpC in no way contested Plaintiff's filing with respect to the Registration of Recreational Uses.

197. Defendant LGpC allowed Plaintiffs' Registration of Recreational Uses to stand unchallenged from April 1990 until the notification of the requirement for application to Defendant LGpC for a Class A Marina Permit was sent by Defendant LGpC to Plaintiffs.

198. While Plaintiffs attempted to comply with the

request of Defendant LGpC for application, Plaintiffs' position remained that their existing filings and application to Defendant DEC for Recreational Uses remained as a valid registration of activities thereby grandfathered.

199. Plaintiffs' interests were established by their registration and acceptance by Defendant DEC and could not later be abridged by unilateral action of the very entity which accepted that filing, Defendant LGpC.

200. If nothing else, Plaintiffs were entitled to rely upon Defendant LGpC's acceptance of these filings when over fifteen (15) and seven (7) years respectively passed before any action was initiated by Defendant LGpC which in any way or manner could be viewed as even a questioning of the grandfathering efficacy of that filing.

201. The basis doctrine of laches prohibits such bureaucratic laxity without even considering the Constitutional ramifications of such attempted action.

202. Plaintiffs were operating and continue to operate under and by virtue of an affirmed application and a validly issued and continuing permit from Defendant DEC, specifically Permit Number 50-81-0071 MA, dated March 22, 1982.

203. Pursuant to law, no legislation has been adopted to supplant the authority of Defendant DEC to issue such operating permit, and said permit still validly authorizes Plaintiffs' operation.

204. On or about March 6, 1990, Defendant White corresponded with Plaintiffs, sending to Plaintiffs the "Lake George Park Commission Application for a Class A Marina Permit". 1. A "Simplified Form" was received by Plaintiffs from Defendant LGpC, furnished by Defendant LGpC agent Keith Fish to be used for recreational uses.

205. After receiving Fish correspondence, Plaintiff

John Salvador responded by letter dated April 23, 1990.

206. Included therewith, Plaintiffs forwarded the duly completed application for registration of recreational uses to Defendant LGpC.

207. Enumerated in Plaintiff's response and registration is the specific request of Plaintiffs for the recording of all recreational uses which as of the date thereof, or in the past, prior to the statutory date of January 1, 1988, were conducted at Dunham's Bay Lodge.

208. Based upon applicable laws, rules and regulations, there existed no requirement that such uses were to be either continuous or occasional.

209. As specified in the Application for registration, Plaintiffs submitted a detailed listing of the recreational activities which Plaintiffs were registering with Defendant LGpC pursuant to Defendant White's request.

210. The original request, as well as the content of Subpart 646-2.2 did not limit such registration of pre-existing uses to facilities owned, offered or controlled by the Marina owner or operator.

211. Subpart 646-2.2 (c) specifically stated that the activities in question were those which were "owned, operated and engaged in on the waters of Lake George".

212. Subpart 646-2.1 also filed May 13, 1988, the stated Intent of the regulations was to "regulate commercial and private recreational activities on the waters of Lake George . . . ."

213. With the stated intent of the provisions in question being regulation of the use of property, those recreational activities which were pre-existing and some beyond the scope of Defendant LGpC regulation, clearly were and are entitled to be afforded the protection of "grandfathering" of "pre-existing" registered activities.

214. The mandated registration of pre-existing uses for the purpose of establishing a base-line for future determinations of what activities did and did not qualify for the "grandfathering" protection is rational and an apparent reasonable quasi-legislative requirement for a person or entity to afford itself of this protection.

215. Plaintiffs acted in reliance, not only on the letter of Defendant White and the forwarding of a new registration form developed by Keith Fish, but also upon the promulgated provisions of Subpart 646-2 concerning recreational uses and registration.

216. Plaintiffs complied with the specific request of Defendant White and the requirements of Subpart 646-2.

217. When Plaintiffs met the above mentioned requirement, Plaintiffs became entitled to the benefits of "grandfathering" clearly afforded to them by the regulations as promulgated.

218. Upon meeting said requirements, Plaintiffs also became entitled to the benefits of "grandfathering" as part of the provisions of the recreation uses permitted by the DEC in 1982, "sales or rental of watercraft".

219. At the time of the filing of Plaintiffs' response to Defendant White's request, the duly completed Recreational Use Registration was filed and was in the hands of Defendant LGpC prior to the June 3, 1990, date specified in Subpart 646-2 (b) wherein the two (2) year "grace" period was established for registration of existing uses.

220. The cover letter of Defendant White and the form provided to Plaintiffs was both vague and unclear concerning what was to be included and how the information was to be submitted in response to the request.

221. Defendant LGpC re-issued a new and separate Application for Registration of a Recreational Use.

222. The vagaries of the form provided by Defendant LGpC to existing users, to a significant extent, followed the vagaries of Subpart 646-2 itself.

223. When Plaintiffs responded and timely filed their Registration with Defendant LGpC pursuant to Defendant White's request, Plaintiffs did not respond with vagaries.

224. Plaintiffs in their filing with Defendant LGpC provided detailed specifics concerning the recreational uses which Plaintiffs affirmed as pre-existing uses for the purpose of the Subpart 646-2.2 registration.

225. Plaintiffs relied upon the clear implication of and implicit representation of intent to "grandfather" such activities for the purpose of future regulation by Defendant LGpC.

226. Following Plaintiffs' completion of and filing of the above referenced Registration of Recreational Uses with Defendant LGpC, Plaintiffs heard nothing further from Defendant LGpC concerning such uses until June 24, 1996, when Plaintiffs first were informed of the requirement by Defendant LGpC for Plaintiffs to "apply" to Defendant LGpC for a Class A Marina Permit.

LGpC APPLICATION AND LGpC'S POSITION ON NAME OF APPLICANT

227. Plaintiffs are the holders of a certain Marina Permit duly issued by the New York State Department of Environmental Conservation on March 22, 1982, Marina Permit No. 50-81-0071MA authorizing the operation of a Marina at the designated location of Plaintiffs' property in the Town of Queensbury situated in the area more

commonly known as Dunham's Bay.

228. On or about June 24, 1996, Plaintiffs received written notification from Defendant LGpC that Plaintiffs were to be required to apply for a Permit to Operate a Class A Marina.

229. Upon information and belief, Defendant LGpC established two (2) classes of Marine Permits which it issued, specifically Class A Marina Permits and Class B Marina Permits.

230. Upon information and belief, Class A Marina Permits were to be applicable to entities defined in Chapter IX of Title 6, New York State Codes, Rules and Regulations, hereinafter referred to as the "NYCRR", Environmental Conservation, Independent Agencies Within Department, section 646-1.2.

231. Upon information and belief, Class B Marina Permits were applicable to entities defined in Chapter IX of Title 6 of the NYCRR, Environmental Conservation, Independent Agencies Within Department, Section 646-1.3.

232. On or about May 13, 1997, by correspondence directed to Defendant DeSantis, as Chairman of Defendant LGpC, relating to the application of Plaintiffs with respect to Defendant LGpC's Update/Renewal process, certain documents were forwarded to Defendant LGpC.

233. The above specified submission was made on behalf of Plaintiffs in accordance with the instructions of Defendant LGpC personnel in form content and timing, in support of Plaintiff's Update.

234. The documents submitted therewith were: Cover letter of submission from Plaintiff John Salvador, Jr., as President/Manager of Dunham's Resort Corp. d/b/a Dunham's Bay Boat & Beach Club; DEC Marina Permit Update Request, duly executed by Plaintiff John Salvador,

Jr., as President/Manager; and "Draft" Permit for the Operation of a Class A Marina as amended and corrected by Permittee with applicable Exhibits and attachments, including written explanation and summary of corrections and amendments to Defendant LGpC staff's original proposed "Draft".

235. By that correspondence request was made that the matter be set down for scheduling on the Commission's agenda and that Plaintiffs be notified promptly of such scheduling.

236. By that correspondence on behalf of Plaintiffs, the request also was made that if any additional information was required or if Defendant LGpC or its staff had any questions concerning the matter, response would be made by or on behalf of Plaintiffs.

237. The position of Defendant LGpC, best expressed by their Attorney, Martin Auffredou at the April 29, 1998, public meeting of Defendant LGpC, strongly recommended to Defendant LGpC that Plaintiffs, as "landowners" be named personally as the applicants and potential Class A Marina Permit holders, a requirement not imposed on other applicants or permittees by Defendant LGpC stating in pertinent part at that meeting that if ". . . there are problems down the road where Defendant LGpC has to get involved with somebody for an enforcement matter or litigated matter, my advice to you is to have the landowner for the purposes of legality, the landowner name has to be included."

238. Even one of Defendant LGpC members was wise enough to recognize the discriminatory treatment being afforded Plaintiffs and their application by Defendant LGpC and stated, "Martin, we just issued one to the Flamingo Restaurant [sic. Resort] on Lake George, and we didn't require George Pestinak's name. Is there any, what's

the difference between . . ."

239. At the conclusion of Plaintiffs' presentation at said April 29, 1998, meeting Plaintiffs attempted to withdraw the pending application for a Class A Marina Permit from consideration by Defendant LGpC.

240. In response to Plaintiffs' attempted withdrawal, Defendant LGpC raised the issue of pursuant to what authority Plaintiffs could continue operation, in response to which Salvador pointed out that the operation was and is governed by the existing DEC permit issued to Plaintiffs, specifically DEC Permit to Operate a Marina on Lake George No. 50-81-0071MA.

241. Defendant LGpC went so far, at that meeting, as to question Plaintiffs' (as applicants) right to withdraw such application, to which Mr. Auffredou first responded vaguely, in response to a further question stated, "I don't want to see John withdraw the application. . .", thereby clearly acknowledging the right of the applicant to withdraw such application.

242. As recently as the notification sent to Plaintiffs advising them of the scheduling their matter for the September 29, 1998, meeting of Defendant LGpC, Defendant LGpC reversed legal course and have stated unilaterally that Plaintiffs may not withdraw their pending application, even after the statement of clearly discriminatory intent with respect to the treatment of their application.

243. Following the conclusion of the April 29, 1998, meeting of the LGpC, Plaintiffs despite their formal withdrawal of their pending application, in an effort at conciliation, agreed to continue in "negotiations" with Defendant LGpC for the purpose of attempting to resolve outstanding differences.

244. To that end, Plaintiffs continued to provide voluminous documents and responses to Defendant LGpC.

245. By letter dated August 13, 1998, on behalf of Plaintiffs to Defendant Auffredou, as Counsel to Defendant LGpC, response was made to correspondence from Defendant Auffredou concerning a proposed meeting on a number of issues relating to Plaintiffs' Marina Permit.

246. By said correspondence on behalf of Plaintiffs, Defendant Auffredou was informed that, as part of Plaintiffs' attempts to resolve outstanding issues relating to said permit, Plaintiffs had been attempting to set up a meeting with the appropriate officials of the Department of Environmental Conservation to discuss a number of issues which are holdovers from Plaintiffs' existing Permit issued by the Department of Environmental Conservation.

247. Defendant Auffredou was advised that the issues to be addressed by the Department of Environmental Conservation were identical to a number of the issues considered by Defendant LGpC.

248. Defendant Auffredou was advised that it was Plaintiffs' position that it would be of assistance to the resolution of Defendant LGpC's issues if the meeting with the Department of Environmental Conservation were held prior to Defendant LGpC taking action on the pending application.

249. Since the Department of Environmental Conservation had not, as of that date, scheduled the proposed meeting, a face to face discussion on a number of these issues as well as others was requested with Defendant Commission and its counsel.

250. Proposed dates for such a meeting were requested from Defendant Auffredou.

251. On behalf of Plaintiffs, by said correspondence, request also was made that final action on Plaintiffs' permit be delayed by Defendant LGpC until these outstanding issues have been resolved in order to avoid unnecessary

litigation.

252. Defendant Auffredou was advised in that correspondence that at the proposed meeting responds would be made to Defendants' your questions concerning personal watercraft.

253. A meeting date was scheduled for August 18, 1998, at the offices of Defendant LGpC in Lake George, New York.

254. Said meeting was attended by counsel for Plaintiffs, Defendants Auffredou, White and Gallagher.

255. At said August 18, 1998, meeting, Defendant White, specifically conceded the intent of Defendant LGpC to utilize the Registration of Recreational Uses (referred to above in statutory history) as a method whereby such prior existing uses would be "grandfathered" and not subject to Defendant LGpC future limitation or required to proceed for "variance" before Defendant LGpC.

256. Upon information and belief, Defendant White's backing and filling on the topic wherein he stated that Defendant LGpC later altered the playing field for those, including Plaintiffs, who had diligently complied with Defendant LGpC's own regulatory requirement, was, at best disingenuous and at worst an exercise in Clintonian verbal manipulation.

257. Upon information and belief, according to Defendant White, after requiring the filing of the Recreational Use Registration, above described, deviated from its original intended purpose as set forth in Subpart 646-2 as promulgated on May 13, 1988, effective June 3, 1988, and unilaterally elected to promulgate new, revised regulations governing such recreational uses.

258. By repeal of Subpart 646-2 and replacement of it with new Subpart 646-1.4 relating to "Special Permits for

Recreational Uses", Defendant LGpC attempted to accomplish by administrative fiat what it did not have the authority to do by valid legislative authorization; i.e., develop recreation uses regulations for both commercial and private users on Lake George.

259. Plaintiffs' compliance with Defendant LGpC's original Registration of Recreational Uses, clearly met and by the responses submitted therewith, exceeded in detail the responses required for such registration by Defendant LGpC.

260. Plaintiffs' filing was both timely under the original provisions of the 1988 regulations of Defendant LGpC and certainly a record of prior existing recreational uses claimed by Plaintiffs as of the January 1, 1991, date establishing a new, extended date for the base-line determination of recreational uses.

261. Nowhere in the regulations as adopted, or in the Notice contained in the State Register was there any language of limitation relating to continuous usage or usage before 1988, between 1988 and 1991, or other specification of such dates of limitation.

262. Plaintiffs first "registered" their recreation uses with the Department Environmental Conservation on November 21, 1981.

263. Plaintiffs both met and exceeded the Recreational Uses Registration requirement pursuant to the written request of Defendant White, in some cases to the point of redundancy since Plaintiffs already had registered the "Sale or Rental of Watercraft" with the Department of Environmental Conservation.

264. Plaintiffs relied upon the representations of Registration in the belief that the uses as registered had been accepted by Defendant LGpC and were "grandfathered" for any future permitting purposes of Defendant LGpC.

265. Defendant LGpC in no way contested the filing of Plaintiffs with respect to the Registration of Recreational Uses.

266. Defendant LGpC allowed Plaintiffs' Registration of Recreational Uses to stand unchallenged from April 1990 until the notification of requirement for application to Defendant LGpC for a Class A Marina Permit was sent by Defendant LGpC to Plaintiffs in June 1996.

267. While Plaintiffs, attempted to comply with the request of Defendant LGpC for application, Plaintiffs continued and continue affirmatively to assert that their existing filings, and application to the Department of Environmental Conservation of Recreational Uses continue, as a valid registration of activities thereby grandfathered, to protect Plaintiffs' interests and could not later be abridged by unilateral action of the very entity which accepted that filing, Defendant LGpC.

268. Following the completion of said meeting on August 18, 1998, Plaintiffs' timely submitted their responses to the LGpC.

269. By letter dated September 10, 1998, counsel for Plaintiffs corresponded with Defendant Auffredou as counsel to Defendant LGpC.

270. Said correspondence dealt with additional information discussed at the August 18, 1998, meeting, and enclosed additional material for consideration by Defendant LGpC.

271. By said correspondence, it was reiterated that by submitting this information, Plaintiffs were in no manner accepting that Defendant LGpC had any authority to refuse to allow Plaintiffs to withdraw their application at any time during the pendency of its consideration by Defendant LGpC or any subpart thereof.

272. It also was requested on behalf of Plaintiffs that if there were any preliminary response from Defendant LGpC staff or Defendant Auffredou prior to the Committee's meeting date, such response(s) be provided to counsel for Plaintiffs within a reasonable time before the meeting date.

273. In the response to the issues and questions discussed at the August 18, 1998, meeting, a summary of the meeting and attendees was set forth, and the subject matter of the meeting identified as the application referred to for the purposes of that response collectively as the "Salvador's Application", but reiterating the fact that said collective reference herein shall in no way or manner was to be deemed to or considered to constitute any acknowledgment or acquiescence to any mingling of entities, each of which shall remain as legally constituted individual and separate entity(ies).

274. Said response next addressed issues relating to the legal authority of Defendant LGpC with respect to specific matters relating directly to Plaintiffs' application.

275. Next followed a brief recitation of the background and statutory authority involved, which has been dealt with more specifically elsewhere in this Complaint.

276. Before specific issues may be considered, this issue must be addressed and resolved.

277. In part, said background information supplied to Defendants reiterated information-both already in the possession of Defendant LGpC and also previously submitted by Plaintiffs as apart of the process before Defendant LGpC, but necessary to restate to clarify the position of Plaintiffs.

278. In said response it was stated that when Plaintiffs, in reliance not only on the letter of Defendant White and the forwarding of a new registration form

developed by Keith Fish, but also upon the promulgated provisions of Subpart 646-2 concerning recreational uses and registration thereof, complied with the specific request of Defendant White and the requirements of Subpart 646-2, they became entitled to the benefits of "grandfathering" clearly afforded to them not only by the regulations as promulgated, but also as by the recreation uses permitted by the DEC in 1982 (sales or rental of watercraft) and ultimately as protected by the United States Constitution, including but not limited to their right to be protected against a regulatory diminution of use of their property, without just compensation (non-revocable DEC permit) and equal protection of the law.

279. Continuing, said statement explained that rather than compensating Plaintiffs, through imposition of additional fees and charges, Plaintiffs, in effect were compelled to pay for the "privilege" of having Plaintiffs' properly registered and protected rights eroded.

280. At the time of the filing of Plaintiffs' response to Defendant White's request, Plaintiffs duly completed Recreational Use Registration filed it with Defendant LGpC prior to the June 3, 1990, date specified in Subpart 646-2 (b) wherein the two (2) year "grace" period was established for registration of existing uses.

281. Upon information and belief, thereafter Defendant LGpC

re-issued a new and separate Application for Registration of a Recreational Use.

282. The vagaries of the form provided by Defendant LGpC to existing users, to a significant extent, followed the vagaries of Subpart 646-2 itself.

283. When Plaintiffs responded and timely filed their Registration with Defendant LGpC pursuant to the Defendant White request, Plaintiffs provided detailed

specifics concerning the recreational uses which Plaintiffs affirmed as pre-existing uses for the purpose of the Subpart 646-2.2 registration.

284. As set forth in the response to Defendant LGpC, Plaintiffs relied upon the clear implication of and implicit representation of intent to "grandfather" such activities for the purpose of future regulation by Defendant LGpC.

285. Following Plaintiffs' completion of and filing of the above the Registration of Recreational Uses with Defendant LGpC, no communication about these matters was received by Plaintiffs until June 24, 1996.

286. At that time, Plaintiffs first were informed of a purported "requirement" of Defendant LGpC for Plaintiffs to "apply" to Defendant LGpC for a Class A Marina Permit.

287. In said response, it was asserted on behalf of Plaintiffs that, if nothing else, Plaintiffs entitled to rely upon Defendant LGpC's acceptance of their filings, when over fifteen (15) and seven (7) years respectively passed before any action was initiated by Defendant LGpC which in any way or manner could be viewed as even a questioning of the grandfathering efficacy of such filings.

288. As stated in said response, Plaintiffs relied upon the basis doctrine of laches would prohibit such bureaucratic laxity without even considering the Constitutional ramifications of such attempted action.

289. Plaintiffs were operating and continue to operate under and by virtue of an affirmed application and a validly issued and continuing permit from the Department of Environmental Conservation, specifically Permit Number 50-81-0071 MA, dated March 22, 1982.

290. Under and by virtue of existing statute of the State of New York, no legislation has been adopted to supplant the authority of the Department of Environmental

Conservation to issue such operating permit, and said permit still validly authorizes Plaintiffs' operation.

291. Also included in said response to Defendants was an analysis of Defendant LGpC's challenge to the grandfathering of certain specific activities previously conducted, documented, permitted to and registered by Plaintiffs.

292. Specifically, the activities challenged by Defendant LGpC include Balloon/parasail, PWCs, and sales and service of boats.

293. Plaintiffs constantly attempted to traverse Defendant LGpC's regulatory maze and consistently complied with each and every, requirement, filing and registration mandated by the ever-changing laws, rules and regulations of Defendant LGpC and as interpreted by Defendant LGpC.

294. Plaintiffs consistently and continually relied upon the grandfathering of each and every activity so filed, registered, and documented as required by the Department of Environmental Conservation.

295. Plaintiffs also detailed in said response the fact that in their original Application for a Permit to Operate a Marina, the application grandfathering the marina operation at that location dating back over twenty-five (25) years prior to that Application.

296. Plaintiffs had applied to the Department of Environmental Conservation and Plaintiffs were granted a non-revocable Permit to Operate a Marina, specifying services provided including, in part: Sale or rental of Water Craft (undefined and unlimited by the application and regulatory definition); Sale or rental of Marine Products; Rental, Lease **or accommodation** for Boats not Registered to the Owner (also undefined and unspecified by application

form and/or regulation); Parking Spaces for 75 Customer Vehicles; Trash Receptacles; Rest Room Facilities; and 67 slips.

297. Plaintiffs in their application provided to the Department of Environmental Conservation, the proper issuing authority, all material requested.

298. Plaintiffs were granted the non-revocable permit in accordance and based upon the terms of said application.

299. In 1990, Plaintiffs duly complied with the regulatory requirements of registration of recreational uses specifying in detail the recreational uses engaged in prior to the regulatory enactment, at Plaintiffs' facility by the "owners" and Plaintiffs' guests while using the facilities offered by Plaintiffs.

300. Responding to the vaguely worded regulatory demand for registration, in their response, Plaintiffs specified, with respect to several particular activities, that while Plaintiffs did not themselves provide the equipment for their guests to engage in certain specified activities, either the guests themselves or other guests had provided, for fee or otherwise, then provided and in the future would provide such equipment or mechanisms for engaging in such activities.

301. Plaintiffs specified that said activities included, but were not limited activities involving Balloon/parasail, PWCs, and sales of boats.

302. Plaintiffs went into detail in their submission and, in said document, under sub-heading of said registration titled "(2) Offering of Parasailing Rides" "Balloon" one (1) "engaged in" and under the sub-heading "(The Operation of a Seaplane" "Balloon" "0" "Owned - "0" "Operated" **but "engaged in"** one (1) by the facility and

others by Guests.

303. Plaintiffs established that the parasail operation "engaged in" directly relates to the Balloon operation also engaged in, since not all parasail operations require motorized towing.

304. As explained in their submission in response to the questions of Defendant LGpC and its staff, the prevailing wind intensity and direction at the Dunham's Bay site allows parasailing at vessel speeds within those permitted within the Town of Queensbury Vessel Regulatory Zone.

305. Plaintiffs also addressed the issue of the use of PWCs in their response.

306. As early as November 1981, Plaintiffs registered said use: The "Sale or Rental of Watercraft including Jet Skis" and noted that in Defendant LGpC's own definitions set forth in the State Register Notice Defendant LGpC defines at reference to Section 646-2.3 "personal watercraft" as "jetskiis", equating the jetski term with the more generic "personal watercraft" above referred to) "(5) Rental of Jet Skis or other Recreational Devices" under the "Type" heading of "Jet Skis" the Salvadors responded that Jet Skis under the heading of "Guests" as used and operated by Guests at the Salvadors' facilities.

307. In their response to Defendant LGpC's request for information, Plaintiffs also addressed the issue of the sale of boats.

308. As detailed to Defendant LGpC, Plaintiffs, in their registration specified under item "(4) Rental **OR OFFERING OF VESSELS**" responded their engagement in said activities with respect to all enumerated types, including but not limited to "Power Boats, Sailboats, Tour Boats, Sail Fish, Sun fish, Row Boats, Canoes & Kayaks".

309. Explaining in their submission to Defendant LGpC, in the original non-revocable Marina Permit issued to Plaintiffs by the Department of Environmental Conservation upon the original application of Plaintiffs, Plaintiffs were authorized by the Department of Environmental Conservation without objection from the Town of Queensbury to engage in the Sale or Rental of Water Craft and Marine Products.

310. As recited to Defendant LGpC by Plaintiffs in their response, Defendant LGpC by statutory mandate Chapter 617 of the Laws of 1987 (ECL 43-0117(5)) took legal status which it might enjoy from its regulatory predecessor the Department of Environmental Conservation to administer 6 NYCRR Part 646 (July 3, 1981).

311. Defendant LGpC, therefore, could not constitutionally deprive those landowners within the regulatory area assigned to Defendant LGpC of the landowners' Constitutional rights and property interests.

312. As a governmental entity, Defendant LGpC was and is not allowed to take private property without just compensation, and the limitation of an existing property constitutes such taking.

313. Plaintiffs detailed in the above mentioned response that by issuing the original non-revocable Marina Permit to Plaintiffs, after noticing the Town of Queensbury of its intent, the Department of Environmental Conservation acknowledged the existing "grandfathered" rights of Plaintiffs to certain specified and outlined operations.

314. After accepting said filing, and issuing the original non-revocable Marina Permit, the Department of Environmental Conservation placed Plaintiffs irrevocably into a class of specifically protected persons and entities entitled to the protection of their pre-existing uses and rights.

315. As explained by Plaintiffs with the enunciation of the mandate for the registration of recreational uses, and the subsequent filing and compliance therewith by Plaintiffs, Defendant LGpC, placed Plaintiffs into a further protected class with respect to the "grandfathering" of those uses.

316. Plaintiffs clearly established in their submission to Defendant LGpC that Defendant LGpC could not later be heard to complain that it "didn't mean it" or that it "changed its mind" or that it "decided to do something else" and thereby years later attempt to deprive Plaintiffs of these clearly established uses.

317. Plaintiffs explained to Defendant LGpC, that Plaintiffs, in yet another attempt to provide Defendant LGpC with information which has not been required of other applicants to establish "pre-existing uses" often which were not even registered by those applicants, provided Defendant LGpC voluminous testimony, photographs and documentation of Plaintiffs' basis establishing Plaintiffs' their entitlement to such uses.

318. In the notification sent to Plaintiffs advising them of the scheduling their matter for the September 29, 1998, meeting of Defendant LGpC, Defendant LGpC reversed legal course and stated unilaterally that Plaintiffs **MAY NOT WITHDRAW** their pending application, even after the statement of clearly discriminatory intent with respect to the treatment of Plaintiffs application.

319. Plaintiffs, however continued to cooperate with Defendant LGpC and its staff and submitted further additional and not legally mandated or required documentation establishing Plaintiffs' engaging in the activities challenged by Defendant LGpC.

320. Plaintiffs included in their submission to Defendant LGpC, a specific reservation of rights and

specifically affirmatively stated therein that by the submission of said statement and documentation, Plaintiffs in no way conceded the legitimacy of the demand of Defendant LGpC staff and advisors.

321. Plaintiffs also noted that the extent and nature of the "proof" required of Plaintiffs far exceeded the requirements placed upon other applicants before Defendant LGpC for the same or similar Permits, as is set forth in the minutes and records of Defendant LGpC itself.

322. By way of example of the failure of Defendant LGpC even to check, verify or accept the records kept in the ordinary course of business of agencies of the State of New York.

323. As part of their submission to Defendant LGpC, Plaintiffs, in support of their business activities as boat dealers, submitted documentary evidence that Plaintiffs were and are duly licensed by the New York State Department of Motor Vehicles as a registered "Boat Dealer" pursuant to the provisions of the New York State Vehicle and Traffic Law, with the current facility identification number of 7081805.

324. As set forth in Plaintiffs' prior filings with the Department of Environmental Conservation and with Defendant LGpC, Plaintiffs' facility has been and continues to include the operation of a Boat Dealer, with all of the legally associated functions affiliated therewith.

325. Earlier in the proceedings before Defendant LGpC, Defendant White challenged the legitimacy of Plaintiffs' operation to conduct repairs and to have the required State permits for a repair shop.

326. Defendant White failed to prepare properly and fully on behalf of Defendant.

327. If a full and complete search of applicable

records been made on behalf of Defendant LGpC, and had Defendant White made himself acquainted with the applicable laws relating to such "repair shops", Defendant White would have been aware of the fact that no separate "permit" is required for the referred to "repair shop" activities on the part of a State permitted Boat Dealer such as Plaintiffs.

328. Before Plaintiffs could seek a State Permit as a Boat Dealer, Plaintiffs were required to have, as Plaintiffs did have as a pre-existing non-conforming use, Town Zoning allowance for such operation.

329. The State could not have issued the existing certification to Plaintiffs as a Boat Dealer without the proper Town Zoning requirements having been met.

330. Other activities engaged in by Plaintiffs and duly "grandfathered", permitted and allowed were challenged or questioned by Defendant LGpC and its staff, and were addressed throughout the permitting and hearing process by Plaintiffs.

331. In their September 1998 response, Plaintiffs incorporated by reference all of their previous submissions and responses to Defendant LGpC.

332. That response of Plaintiffs in no way was intended to concede nor did it assent to agreement with Defendant LGpC with respect to any points not specifically addressed therein.

333. Said response of Plaintiffs was directed specifically only to those issues raised by Defendant LGpC staff and Defendant Auffredou at the August 18, 1998, meeting.

334. Plaintiffs took the position which they continue to hold that the activities which Plaintiffs are authorized to engage, in compliance with law, rules and regulation, have

been duly filed, registered, and noticed as required, with the State of New York, the Town of Queensbury, the Department of Environmental Conservation and Defendant LGpC in conformance with applicable laws, rules and regulations in proper and timely manner.

335. Plaintiffs and their guests, as allowed by the rights flowing to them from Plaintiffs, have engaged in numerous activities legally allowed, a fact which Plaintiffs placed Defendant LGpC on timely and proper notice.

336. Plaintiffs obtained and hold a duly issued non-revocable Permit from the Department of Environmental Conservation which Permit, by its nature and terms has no specified duration.

337. The Class A Marina Permit which now was the subject matter of the prior consideration by Defendant LGpC, its staff and its attorney, would constitute a Revocable Permit of five (5) year duration.

338. Plaintiffs clearly and consistently have stated that the ex post facto enactment of and attempted enforcement of new laws, rules or regulations now is viewed as an attempted limitation of pre-existing, and in this case, also specifically "grandfathered" activities.

339. Plaintiffs maintain that the activities of their marina are, have been and shall continue to be authorized and permitted pursuant to their existing Department of Environmental Conservation non-revocable Marina Permit and that any issue with respect to grandfathering of any activities specified in either or both Plaintiffs' Department of Environmental Conservation permit filing or the Recreational Uses filing with Defendant LGpC itself, are legally authorized and allowed.

340. Plaintiffs also submitted extensive documentary evidence in support of their position along with their

statement of response to Defendant LGpC.

341. Thereafter, upon information and belief, Defendant Auffredou, as counsel for Defendant LGpC, made request for clarification of certain information and for additional information concerning certain matters relating to Plaintiffs' marina operation.

342. By letter dated September 14, 1998, and transmitted via facsimile and mail, counsel for Plaintiffs' responded to the requests of Defendant Auffredou.

343. Information was provided on behalf of Plaintiffs concerning requested additional information relative to the time that various services were offered by Plaintiffs.

344. Said response related that the approximate times of service of the brochures submitted as exhibits were: Lake George Sailing Unit - 1984-1989; Bill and Sally Engelhardt - 1996 - Present Sailing; Bill Robinson - 1997 - Present.

345. Defendant Auffredou also was informed that Plaintiffs had offered other services over the last twenty-five (25) years but the records concerning those activities were not available.

346. Plaintiffs' response also advised Defendant Auffredou that dock space was rented to the specified individuals and no other fees or money are received from such persons or entities.

347. Plaintiffs confirmed to Defendant Auffredou that all of said individuals were registered marina clients.

348. On behalf of Plaintiffs, the willingness to provide additional information and/or documentation again was renewed if Defendant Auffredou or Defendant LGpC had any further inquiries concerning Plaintiffs' marina operation.

349. By correspondence dated September 15, 1998, via Express Mail to Defendant DeSantis, as Chairman of Defendant LGpC, counsel for Plaintiffs forwarded eleven (11) [one (1) each for Defendant DeSantis and each member of Defendant LGpC] copies of a submission of Plaintiffs with respect to the Application for a Class A Marina Permit before Defendant LGpC for Dunham's Bay Lodge provided as a courtesy to Defendant LGpC to facilitate understanding of the position of and additional proof and documentation submitted by Plaintiffs.

350. Defendant DeSantis also was advised by that correspondence that said material previously was provided to Defendant Auffredou as attorney for Defendant LGpC as requested by Defendant Auffredou and staff of Defendant LGpC at the August 18, 1998, meeting between counsel for Plaintiffs and Defendant Auffredou and LGpC staff.

351. In said correspondence, the rights of Plaintiffs were specifically reserved.

352. Defendant DeSantis was advised in said letter that submission of said material was offered in a spirit of cooperation with Defendant LGpC, but in no way constituted a waiver of any right(s), cause(s) of action or legal remedy(ies) available to Plaintiffs.

353. Plaintiffs, in reliance upon the statements made by Defendant Auffredou, Defendant White and Defendant Gallagher at the above mentioned August 18, 1998, meeting with counsel for Plaintiffs, believed that the matter of the previously withdrawn application was not to be considered or discussed at the scheduled meeting of the Committee for August 19, 1998.

354. Plaintiffs, in reliance upon said statements and representations of the above specified Defendants believed that the matter, instead would be considered at the September 23, 1998, Committee meeting.

355. The September 23, 1998, meeting of the Committee was the logical date for the Committee to consider these matters, since, upon information and belief, that would be the first date for meeting of the Committee following the date for submission of the explanatory and additional material by Plaintiffs flowing from the August 18, 1998, meeting.

356. Plaintiff John Salvador, Jr., attended said September 23, 1998, meeting of the Committee accompanied by counsel.

357. According to a "Statement Concerning Purpose & Conduct of LGPC Project Review Committee Meetings" made at the commencement of a certain meeting of the LGpC Project Review Committee, hereinafter referred to as the "Committee", occurring on September 23, 1998, the purpose of that Committee is ". . . to review permit applications pending before Defendant LGpC in order to make recommendations to the full Commission concerning the issuance, modification, or denial of the application as well as any State Environmental Quality Review Act determinations."

358. According to said statement, the Committee is composed of three (3) members of Defendant LGpC and is chaired by Defendant Stewart.

359. Also set forth therein is the policy statement that "Permit Applications are initially received by Park Commission staff and are reviewed by an Environmental Analyst."

360. The statement also sets forth that public comment also is solicited as part of the process.

361. According to that document, the public comment usually is fifteen (15) days, and that, in general, the Committee only makes its decisions concerning "issuance" only after the conclusion of the specified public

comment period.

362. Said policy declaration also specifically stated that while the meetings of the Committee are open to the public, "It should be noted that it is not the purpose of this meeting [referring to the meeting of 9/23/98] to disseminate information to the general public about a particular project not to engage in public debate concerning the merits of any application." [Emphasis added]

363. The Statement went on to specify the procedures which would follow the conclusion of the Committee's meeting, stating as follows: "The recommendations of the Project Review Committee will be taken before the full Park Commission at their next meeting at which time the full Commission will vote on each recommended action."

364. At the conclusion of said policy statement the following language, attempting by unilateral action of Defendant LGpC retroactively to attempt to create revocable permits (including non-LGpC issued permits), recites: "It should be noted that Commission permits may be suspended, modified or revoked for good cause at any time by the Commission."

365. The above language implies that such "suspension", "modification" or "revocation" is may be undertaken by Defendant LGpC without notice or hearing.

366. Defendant LGpC's stated "suspension, "modification" or "revocation" would be by unilateral action of Defendant LGpC.

367. Said policy statement also provided for and contemplated not process for appeal of any such action by Defendant LGpC.

368. Upon information and belief, at said September 23, 1998, meeting of the Committee, the above mentioned

Statement was read or otherwise incorporated into the record of the Committee meeting.

369. Thereafter, a typewritten copy of said statement was obtained from staff of the LGpC on behalf of Plaintiffs.

370. Plaintiffs had been informed by staff of Defendant LGpC that the matter of their pending application was to be considered at the September 23, 1998, meeting of the Committee.

371. At said September 23, 1998, Committee meeting, Plaintiffs learned for the first time that, despite the representations made by Defendant LGpC staff and by Defendant Auffredou to Plaintiffs' attorneys at the meeting held on August 18, 1998, that the matters relating to Plaintiffs would not be considered until the September 23, 1998, Committee meeting of Defendant LGpC to allow time for Plaintiffs to respond to questions raised, including questions raised by Defendant LGpC staff at said August 18, 1998, meeting, the matters invoking Plaintiffs were considered at a certain meeting of the Committee held, upon information and belief, on August 19, 1998.

372. The August 19, 1998, Committee meeting took place even before the date agreed to among counsel for Plaintiffs and Defendant LGpC staff and Defendant Auffredou.

373. Following this revelation, following the conclusion of the Committee meeting of September 23, 1998, by letter dated September 23, 1998, addressed to Defendant DeSantis, as Chairman of Defendant LGpC, Defendant LGpC, its members and staff were reminded on behalf of Plaintiffs that at the April 29, 1998, meeting of Defendant LGpC, Plaintiff John Salvador, Jr. withdrew, on the record the then pending application for a Class A Marina Permit which also had been the subject of discussion at the

September 23, 1998 Defendant LGpC's Project Review Committee.

374. By that correspondence, Defendant DeSantis and Defendant LGpC also were reminded on behalf of Plaintiffs that, since the April 29, 1998, withdrawal of said application, Plaintiffs continued to work in a spirit of cooperation with Defendant LGpC and its staff to resolve various outstanding issues with respect to said original Class A Marina Permit Application.

375. Plaintiffs, Defendant DeSantis and Defendant LGpC were informed, continued to take the position that said original application is withdrawn, despite conflicting statements both on and off the record made by or on behalf of Defendant LGpC.

376. Defendant DeSantis and Defendant LGpC were informed that many of the items in contention remained unresolved.

377. Plaintiffs also advised Defendant DeSantis and Defendant LGpC that it was Plaintiff' intention to submit a new Class A Marina Permit Application to Defendant LGpC, but that Plaintiffs' prior Application remained withdrawn as stated by Plaintiff John Salvador, Jr. on the record on April 29, 1998, at the meeting of the LGpC.

378. Defendants DeSantis and the LGpC were informed that since that application remained withdrawn, Plaintiffs would not be participating in the scheduled meeting of Defendant LGpC on September 29, 1998.

379. Upon information and belief, at the time of said correspondence, there was an agenda item with respect to the application of Plaintiffs on Defendant LGpC's schedule for the September 29, 1998, meeting.

380. Defendant DeSantis and Defendant LGpC were reminded that, the applicant, here Plaintiffs, can legally

withdraw an application at any time prior to final action.

381. A request was made in said correspondence on behalf of Plaintiffs that documentation be provided by Defendants that the agenda item relating to Plaintiffs' application was withdrawn from consideration prior to the date of the September 29, 1998, meeting of Defendant LGpC.

382. On behalf of Plaintiffs, Defendant LGpC was informed that a new Class A Marina Permit application would be submitted to the Commission when completed based upon all existing facts and any additional information obtained as a result of the September 23, 1998, Committee meeting.

383. Defendant LGpC was informed on behalf of Plaintiffs, that Plaintiffs intended to continue to function, as in the past, under the irrevocable Permit previously issued by the Department of Environmental Conservation, Defendant LGpC's supervising parent agency.

384. Based upon representations made to Plaintiffs by Defendants, it was the understanding of Plaintiff that the matter of a Class A Marina Permit application relating in any manner to Plaintiffs would not be considered by Defendant LGpC at a certain meeting of the LGpC held on August 18, 1998, to allow for submission of additional material by Plaintiffs, pursuant to discussions between Plaintiffs' attorneys and representatives of Defendant LGpC, specifically Defendants White, Gallagher and Auffredou.

385. At a certain meeting of the Project Review Committee, at which Plaintiffs had been informed the matter of a Class A Marina Permit relating to their property would be considered based upon the submission of additional material as specified at said August 18, 1998 meeting, Plaintiffs learned that the matter of said Class A Marina Permit, instead had been considered and dealt with at the August 19, 1998, meeting.

386. Plaintiffs also learned for the first time at said Project Review Committee meeting that Defendant Gallagher had, on behalf of Defendant LGpC, unilaterally rewritten said Permit and that it had been put "in the mail" to Plaintiffs so that it would be received by Plaintiffs only after the conclusion of the September 23, 1998, Project Review Committee Meeting.

387. Plaintiffs also learned, therefore, that the information considered by Defendant LGpC at the meeting at which the content of said "Revised" Permit was determined could not possible have included the material provided by Plaintiffs in response to issues raised by Defendant LGpC which were discussed with Plaintiffs attorneys at the above mentioned August 18, 1998 meeting with Defendants White, Gallagher and Auffredou.

388. The responses, which had been submitted within the time frame agreed to at said meeting related to the specific issues/objections raised by Defendant LGpC, Defendants White, Gallagher and Auffredou.

389. Upon information and belief, at the meeting at the offices of Defendant LGpC held on August 18, 1998, was clearly stated by Plaintiffs' attorneys as in no way or manner to be deemed agreement to, conceding of or reinstatement with respect to the previously pending application of Plaintiffs.

390. Upon information and belief, the underlying basic issue of Defendants LGpC, White, Gallagher and Auffredou focused upon the scope of legal authority of Defendant LGpC.

391. Plaintiffs contended and do contend that by regulation 6 NYCRR Part 646 dated July 3, 1981, Defendant DEC, pursuant to the authority legislatively granted and delegated to Defendant DEC authority over owners of marina facilities situated on Lake George were required to

complete an application for a non-revocable Permit to Operate a Marina on Lake George.

392. As above set forth, Plaintiffs duly complied with all applicable requirements relating to the operation of such marina and the obtaining of the required non-revocable permit.

393. Plaintiffs continue to operate their marina to the date hereof under, by virtue of and in accordance with said Non-revocable Marina Permit issue to them by Defendant DEC.

394. As above specified, Plaintiffs also complied with the Registration of Recreational Uses when requested.

395. Defendant LGpC challenged the grandfathering of certain specific activities previously conducted, documented, permitted to and registered by Plaintiffs.

396. Specifically, the activities challenged by Defendant LGpC include Balloon/parasail, PWCs, and sales and service of boats.

397. In responding to the issues raised by Defendant LGpC, Plaintiffs have constantly attempted to traverse Defendant LGpC's regulatory maze and have consistently complied with each and every, requirement, filing and registration mandated by the ever-changing Commission laws, rules and regulations.

398. Plaintiffs consistently and continually have relied upon the grandfathering of each and every activity so filed, registered, and documented as required by the DEC and its statutory successor(s) in interest.

399. Plaintiffs in their original Application for a Permit to Operate a Marina to Defendant DEC the application grandfathering the marina operation at that location dating back over twenty-five (25) years prior to that Application, Plaintiffs applied to DEC and were granted a

non-revocable Permit to Operate a Marina specifying services provided including, in part: Sale or rental of Water Craft (undefined and unlimited by the application and regulatory definition); Sale or rental of Marine Products; Rental, Lease or accommodation for Boats not Registered to the Owner (also undefined and unspecified by application form and/or regulation); Parking Spaces for 75 Customer Vehicles; Trash Receptacles; Rest Room Facilities; and 67 boat slips.

400. Plaintiffs provided to Defendant DEC, the proper issuing authority, all material requested, and Plaintiffs were granted the non-revocable permit in accordance and based upon the terms of said application.

401. In 1990 Plaintiffs again duly complied with the regulatory requirements of registration of recreational uses, specifying in detail the recreational uses engaged in prior to the regulatory enactment, at their facility by the "owners" and their guests while using the facilities offered by Plaintiffs.

402. In said registration, responding to the vaguely worded regulatory demand for registration, Plaintiffs specified, with respect to several particular activities, that while they did not themselves provide the equipment for their guests to engage in certain specified activities, either the guests themselves or other guests had provided, for fee or otherwise, and in the future would provide such equipment or mechanisms for engaging in such activities.

403. With respect to the activities involving Balloon/parasail, PWCs, and sales of boats Plaintiffs in said registration specified as follows: Under sub-heading of said registration titled "(2) Offering of Parasailing Rides" "Balloon" one (1) "engaged in" and under the sub-heading "(The Operation of a Seaplane" "Balloon" "0" "Owned - "0" "Operated" but "engaged in" one (1) by the facility and

others by Guests.

404. Plaintiffs position is and has been that the activities of their marina are, have been and shall continue to be authorized and permitted pursuant to their existing Defendant DEC non-revocable Marina Permit and that any issue with respect to all legally pre-existing activities specified in either or both their DEC permit filing or the Recreational Uses filing with Defendant LGpC itself, continuing to be legally authorized and allowed.

405. By Resolution No. 98-69 of Defendant LGpC dated September 29, 1998, Defendant LGpC acted upon the application which Plaintiffs repeatedly had withdrawn starting on April 29, 1998.

406. Said Resolution referred incorrectly to Dunham's Bay Resort Corp., Inc. despite the fact that Plaintiffs repeatedly had informed Defendant LGpC, its employees and its attorney of the identification of the applicant.

407. In said Resolution, Defendant LGpC acknowledged the fact that Plaintiffs' facility had been issued a marina permit by the Department of Environmental Conservation.

408. Said Resolution only recited the letter of September 23, 1998, withdrawing Plaintiff's application to Defendant LGpC.

409. Said Resolution did not acknowledge the verbal withdrawal of application by Plaintiff John Salvador, Jr. on the record at the April 29, 1998, meeting of Defendant LGpC.

410. Defendant LGpC in said resolution also incorrectly stated that Plaintiffs' facility only commenced in 1997.

411. At the time at which the staff of Defendant LGpC conducted site inspection of Plaintiffs' facility, they

did not observe PWCs on site due to the fact that PWCs were in winter storage at that time, a situation which Plaintiffs' had informed Defendant LGpC staff of at the time of said inspection.

412. Additionally, Defendant LGpC's Resolution incorrectly stated that the rental of PWCs was not an activity by the Department of Environmental Conservation permit under and by virtue of which Plaintiffs operate their facility.

413. Defendant LGpC's Resolution also states as fact the incorrect premise that Plaintiffs purportedly extended their wharfs from twenty-four (24) to thirty (30) feet in length.

414. As Plaintiffs had repeatedly informed Defendant LGpC and its staff, the extension of the docks in question was duly authorized and permitted by the Department of Environmental Conservation.

415. All applicable applications were timely and properly made by Plaintiffs to the applicable regulatory authority at the time, that being the Department of Environmental Conservation.

416. No extensions of docks was done by Plaintiffs without first having all applicable permits and authorizations.

417. In fact, commencing in 1988, Defendant LGpC charged Plaintiffs for dock registration fees based upon said docks being thirty (30) feet in length.

418. Defendant LGpC continually assessed Plaintiffs on the basis of the thirty (30) foot length docks and to demand payment based on said linear footage.

419. Defendant LGpC accepted payment from Plaintiffs for thirty (30) foot dock length for said docks.

420. The thirty (30) foot length of said docks was

grandfathered by the Department of Environmental Conservation permitting previously legally approving said dock extensions.

421. In said resolution Defendant LGpC unilaterally stated that while Defendant LGpC acknowledged the withdrawal of said application by Plaintiffs, Defendant LGpC claimed that such withdrawal did not "negate" Defendant LGpC's jurisdiction over the "subject facility".

422. Further statements contained in Defendant LGpC's Resolution set forth a specific finding that ". . . the continued operation of the subject facility without a Class A marina permit from the Commission is a violation of Commission regulations, . . .". [Emphasis added]

423. Said resolution went on to find that ". . . the NYSDEC marina permit for the subject facility was superseded by the enactment of the Commission's regulations applicable to Class A marinas on June 3, 1988, . . .".

424. Defendant LGpC in said resolution did not even attempt to justify the alleged "superseding" of an existing permit granting to Plaintiffs a valid property right.

425. Defendant LGpC did not even attempt to allege any notice to Plaintiffs of the alleged "superseding" of or elimination of Plaintiffs' existing rights.

426. In a vain attempt to deal with the effective attempted termination of Plaintiffs' rights, Defendant LGpC, in a back-handed statement ". . . acknowledges that the NYSDEC permit may be utilized to establish a baseline level of marina activity offered at the subject facility which would form the basis of a Class A marina permit from the Commission, . . .".

427. Defendant LGpC, did not, however, acknowledge or admit that Plaintiffs' existing and continuing permit from the Department of Environmental

Conservation allowed Plaintiff to continue their operation as legally authorized, permitted and approved by the appropriate permitting entity.

428. Defendant LGpC cannot by attempted ex post facto legislation and/or attempted application to Plaintiffs deny Plaintiffs of a validly existing property right and liberty interest.

429. Defendant LGpC, in said resolution also incorrectly made a finding that ". . . the offering of PWC rental at the subject facility constitutes an expansion of the subject facility. . ." and Defendant LGpC required a further permit for such operation.

430. Despite the clear documentation presented by Plaintiffs of the pre-existing timely authorization of PWC rental at Plaintiffs' facility by the appropriate permitting governmental entity, Defendant LGpC specifically ignored the facts as they existed with respect to Plaintiffs.

431. Defendant LGpC, in said resolution also incorrectly set forth a finding that the wharfs ". . . have been extended and/or modified without a permit, the permits are maintained in violation of the permit requirements and design standards of 6 NYCRR Part 646, . . .".

432. As set forth elsewhere in this Complaint, Plaintiffs specifically detailed in their proof to Defendant LGpC Plaintiffs timely compliance with the applicable provisions of law, rule and regulation.

433. Prior to any extension of wharfs by Plaintiffs, Plaintiffs first obtained the necessary permits and authorizations from the Department of Environmental Conservation, the governmental entity charged with the duty of regulating such extensions.

DESPERATE TREATMENT OF PLAINTIFFS BY

DEFENDANTS, INCLUDING DEFENDANT LGpC

434. Upon information and belief, on or about August 21, 1996, application was made to Defendant LGpC for a Class A Marina Permit by Frank J. Parillo, hereinafter referred too as the "Parillo Application".

435. Upon information and belief, on or about the 12th day of March, 1991, Frank J. Parillo, hereinafter referred to as "Parillo", or his agent(s) recorded a deed purporting to acquired title from the Estate of an Allison Ellsworth to certain real property located in the area more commonly referred to as Dunham's Bay, Lake George.

436. Upon information and belief, on or about the 31st day of October, 1985, Parillo, or his agent(s) recorded a deed purporting to acquired title from an Robert Ellsworth to certain real property located in the area more commonly referred to as Dunham's Bay, Lake George.

437. Upon information and belief, during approximately 1989, Parillo sought a zoning variance from the Town of Queensbury Zoning Ordinances then in effect, specifically designated as Use Variance No 98-1989.

438. Upon information and belief, said application dealt with exemption sought from various zoning provisions on the claim of "pre-existing use" by Parillo.

439. Upon information and belief, in support of said Use Variance Parillo submitted an affidavit entitled "Affidavit to Demonstrate Pre-Existing Use", sworn to on September 20, 1989.

440. Upon information and belief, as is set forth in said Affidavit no reference is made to any existing permit in the name of Robert Ellsworth.

441. Upon information and belief, based upon the

records of the Town of Queensbury, in addition to said affidavit in support of application Parillo also submitted a form designated as "14-16-4 (2/87)- Text 12" and titled "617.21, Appendix C, State Environmental Quality Review, Short Environmental Assessment Form, For Unlisted Actions Only", with two (2) page attachment thereto.

442. Upon information and belief, although said Environmental Assessment Form is unsigned, the copy of said document submitted herewith is in the form as obtained from the records of the Town of Queensbury, and a portion of the record upon which the Town of Queensbury Zoning Board based its determination in the matter of the application of Parillo for a use variance.

443. Upon information and belief, in Paragraph "III" of the attachment, specifically refers to one (1) existing permit from Defendant LGpC only held by Parillo and also specifies that "nor are commercial boat repairs conducted on the property."

444. Upon information and belief, said document purports to set forth the entire operation run by Parillo and clearly does not establish or even allege the existence of any permit issued to Robert Ellsworth pursuant to which Parillo claimed any right to operate.

445. Upon information and belief, according to correspondence from Karl E. Parker of Defendant LGpC addressed to Lee York of Defendant Town of Queensbury dated October 25, 1989, concerning the above referred to Zoning variance application of Parillo, reference therein by Defendant LGpC clearly indicated the existence of only one (1) permit for the areas involved, that being the Allison Ellsworth permit, identified therein as marina permit #50-82-0146.

446. Upon information and belief, according to the terms of the Allison Ellsworth permit and the application

submitted by Allison Ellsworth in support thereof the underlying application and, therefore, the permit resulting therefrom, relates to 95 vessels, which vessel count specifically included ten (10) vessels on the lake, not in the brook, in that count.

447. Upon information and belief, in considering the above mentioned Parillo Zoning variance application, testimony and submissions were taken by the Queensbury Zoning Board of Appeals at their second regular meeting held on December 27, 1989.

448. Upon information and belief, based upon the minutes of said Zoning Board meeting, at said meeting testimony and submissions were taken on the record concerning the Parillo (then pending) application and specific reference to the marina operations by Parillo were made by or on his behalf.

449. Upon information and belief, a person identified in the minutes of said meeting to be a Mr. Richards, speaking on behalf of Parillo at said meeting detailed the marina operations and explained the acquisition process from both Allison Ellsworth and Robert Ellsworth.

450. Upon information and belief, continuing in support of the Parillo zoning variance application, in the presence of Parillo and at Parillo's behest, Mr. Richards went on to state according to said minutes, in pertinent part:

> MR. RICHARDS-Stated what we've got is a permit. I think Allison Ellsworth had a permit. Frank had applied to have the permit transferred over to him which he received this Spring. In his application he estimated a boat launch of 20+- boats a day and that's where the figure

> comes from. That was part of his application when the permit was given.

451. Upon information and belief, continuing in support of his zoning variance application, Parillo stated in his presentation to the Queensbury Zoning Board of Appeals also supporting the existence of only one (1) marina permit according to the minutes of said meeting, as follows:

> MR. PARILLO-Stated we didn't examine any records. You want to keep in mind that the Ellsworth's [sic.] were over 80 years old. We signed the contract to divide this in 1988 under the assumption that the launch was an intrical [sic.] part of the marina, that it could be reopened. It was never advised that it couldn't be. I had conversations with Dave Hatin and until the day which was, I believe, in July, we were under the assumption that it was a part of the marina and that there would be no problems. We got the permit transferred from DEC. There was a year lapse from the time we signed the contract until we bought it because Mr. Ellsworth [Allison] had passed away. To answer your question, there weren't any records to examine.

452. Upon information and belief, the Queensbury Zoning Board thereafter acted, in reliance upon the

information, evidence and testimony provided to the by and on behalf of Parillo and summarized their finding in Motion and action there on December 27, 1989.

453. Upon information and belief, thereafter, in support of Parillo position with respect to Parillo's marina operation, John W. Caffrey provided an Affidavit sworn to December 2, 1992, wherein specific reference is made to the authority pursuant to which Parillo operated his marina, said authority resting solely upon the transfer of the above referenced Allison Ellsworth permit.

454. In the early 1990's Plaintiffs filed requests under the Freedom of Information Law, hereinafter referred to as "FOIL", requests filed by Plaintiffs with (Defendant LGpC and/or Defendant DEC requesting copies of all Marina permits issued by them as of the date thereof for all marinas operating on Lake George, including but not limited to the area on or abutting Lake George more commonly known as Dunham's Bay.

455. On or about the 11th day of October, 1996, Plaintiffs received response to one of their above mentioned FOIL request from LGpC.

456. Included in said FOIL request response received by Plaintiffs was a copy of a marina permit purportedly issued to Allison Ellsworth (permit no 50-82-0146) on December 20, 1982 by the Defendant DEC.

457. Included in said FOIL request response received from the LGpC was a copy of an alleged transfer of the marina permit purportedly issued to Allison Ellsworth on December 20, 1982, by Defendant DEC transferred to Parillo by Defendant LGpC on June 20, 1989.

458. Nowhere in response to the FOIL request was there included any marina permit for Robert Ellsworth.

459. Upon information and belief, in the Parillo

application for Permit made to the LGpC Parillo specifically identified by tax parcel identification number those parcels for which and in relation to which his application was made, nowhere in said permit application by Parillo is the tax map identification number for the parcel acquired by Parillo from Robert Ellsworth included.

460. Upon information and belief, said application as made by Parillo, on page two of the application it is specifically limited to prior permit or registration of Mabel and Allison Ellsworth, no reference is made therein to any alleged permit held by Robert Ellsworth.

461. By Notice which Plaintiffs received from Defendant LGpC dated August 1, 1996, Plaintiffs became aware of the fact that Parillo had applied to Defendant LGpC for what was identified therein to be a "Class A Marina Permit".

462. Said Notice received by Plaintiffs contained no reference to claim of two (2) purportedly existing permits transferred to Parillo.

463. By letter dated August 21, 1996, Plaintiff John Salvador, Jr. responded to the LGpC to the Notice concerning the Parillo application.

464. Prior to that time, Parillo had commenced litigation against Plaintiffs claiming title to certain docks which Parillo operated on property titled in Plaintiffs and to which he made claim under color of title through Quit Claim Deed, which litigation went to trial and judgment with order dated October 30, 1996.

465. A copy of decision and order of Judge Moynihan in said action was made a part of the record before the LGpC at the committee meeting held on February 19, 1997 at 1:00 P.M. at the Lake George Town Hall.

466. In that decision the Court held that Parillo did

not have title to the land on which said docks were situated.

467. Other statements contained in said decision and order were beyond the scope of the matters at issue in the trial and the gratuitous comments contained therein are not law of the case nor are they res judicata as to the issues set forth therein; rather, they constitute non-binding dicta.

468. Thereafter, Parillo filed a Notice of Appeal of said Order.

469. After the appeal was perfected by Parillo and heard by the Appellate Division, the decision of Judge Moynihan was altered somewhat and returned to Judge Moynihan for further proceedings what have not occurred as of the date hereof.

470. No stay pending appeal of said Order ever was sought or obtained by Parillo, to allow his continued use of said parcel under claim of right of title contrary to the statements made by Mr. Sweeney at the above referenced February 19, 1997, meeting.

471. Upon information and belief, with reference to the issue of "quick launch" which was considered by Defendant LGpC with respect to the Parillo application, Plaintiffs requested any information submitted by Parillo in accordance with the requirements for registration of recreational uses which has been mandated for such users.

472. Plaintiffs did not receive from Defendant LGpC any information supplied by Parillo for consideration of such submission and registration of Parillo.

473. Plaintiffs also pointed out to Defendant LGpC in their consideration of the Parillo application the fact that other issues remained outstanding and unresolved, including but not limited to the issues raised by the Town of Queensbury through its representative James Martin, in his letter to Defendant Gallagher of Defendant LGpC dated

August 21, 1996.

474. Upon information and belief, the proposed submission of Parillo as considered by Defendant LGpC would constitute an expansion of the previously allowed use as allowed in accordance with the Town of Queensbury ordinances and rules.

475. Upon information and belief, Parillo did not submit an adequate parking plan to Defendant LGpC.

476. Upon information and belief, a map with generalized markings indicating vague locations and number of "cars" was considered by the sub-committee of Defendant LGpC, such map clearly did not constitute a "parking plan".

477. Upon information and belief, no designation of size and location of parking spaces, traffic isles, allowing adequate space for backing and turning and specification of methods and designated areas of ingress and egress in conformance with standards as set forth in generally accepted AASHTO guidelines and specifications was submitted or considered by Defendant LGpC with respect to the Parillo application.

478. Upon information and belief, Defendant LGpC was placed on notice by Richard J. Cipperly of Defendant DEC of serious outstanding issues which, as stated by Mr. Cipperly in his letter to Defendant LGpC dated September 25, 1996, in which he stated in pertinent part, ". . . would ask the Commission to delay any new or renewal [of Parillo permits] until the ownership issue is resolved . . . ."

479. Upon information and belief, thereafter, the matter of said application came on before Defendant LGpC for consideration.

480. Plaintiffs attended certain public meetings of Defendant LGpC at which the Parillo Application was an

agenda item.

481. At the meeting held on June 25, 1997, Plaintiffs were in attendance, and information was presented by them and on their behalf with respect to the position of Plaintiffs concerning the Parillo Application.

482. Written statements also were submitted by and on behalf of Plaintiffs with respect to the Parillo Application.

483. One (1) issue raised by and on behalf of Plaintiffs with respect to the Parillo Application related to the wharf registration compliance of the Parillo predecessor(s) in interest.

484. Upon information and belief, the wharf registration of Allison Ellsworth underlying the issuance of the Parillo Class A Marina Permit was unsigned and the verification thereon had been stricken.

485. Upon information and belief, despite the fact that the form was signed on behalf of Defendant DEC by Defendant White accepting the registration form.

486. It was and is Plaintiffs' position that any permit(s) flowing from the above mentioned registrations and permit(s) were and are inherently defective and, therefore, void ab initio.

487. Since, as Defendant Auffredou stated at the June 25, 1997, meeting, the Marina Permits run with the land, transferring to the succeeding property owner, Plaintiffs contended to Defendant LGpC that the only rights which are and have been in the past transferred to Parillo were and are those legally pre-existing uses which he operates under and by virtue of his predecessors in title and interest, specifically, Allison Ellsworth and Robert Ellsworth.

488. Plaintiffs argued to Defendant LGpC that, if the initial filing (Allison Ellsworth's unsigned and unverified

initial registration) was and is defective, no rights can flow to Parillo from such void initial filing.

489. Plaintiffs raised the issue to Defendant LGpC that a civil servant (Defendant White), acting ultra vires, purportedly on behalf of Defendant DEC, cannot unilaterally correct such inherent underlying defect.

490. Plaintiffs also raised the issue to Defendant LGpC that no notice was given to Plaintiffs or to any other members of the public or affected parties of the intention of Defendant LGpC to "merge" two (2) permits, specifically the Allison Ellsworth and the Robert Ellsworth permits.

491. Plaintiffs pointed out to Defendant LGpC that this issue was raised specifically at the February 19, 1997, meeting of Defendant LGpC reviewing the Parillo application for a Class A Marina Permit.

492. The issue concerning the expansion of said permit also was raised at the February 19, 1997 meeting.

493. Plaintiffs also referenced additional information obtained from the tax record cards relating to the both the Robert Ellsworth property and the Allison Ellsworth property clearly establishing the uses which the prior owners of the property in question claimed for said property and established the basis upon which the parcels were taxed by the applicable municipalities.

494. Plaintiffs presented to Defendant LGpC the fact that the tax records determine the only use which one of the prior owners, specifically Robert Ellsworth, which relates in any way to the uses claimed to be prior commercial uses in the Parillo Application, is the operation of a limited number of docks (less than asserted to be the base dock use number in the Parillo permit for the former Robert Ellsworth property) and operation of a marine gas pump.

495. Upon information and belief, based upon the

material contained in the above mentioned tax records, it was presented by Plaintiffs to Defendant LGpC that it appeared that the marine gas pump operation was abandoned by Robert Ellsworth well before the termination of his ownership of the property.

496. Plaintiffs, therefore, contended to Defendant LGpC that, according to those tax records, there was only limited commercial use of the Allison Ellsworth property in question, prior to the conveyance of the property out of Allison Ellsworth and not at the levels claimed by Parillo.

497. Plaintiffs also pointed out to Defendant that no statutory authority exists for the purported attempted merger by the Commission of Robert Ellsworth and Allison Ellsworth permit in Parillo.

498. Plaintiffs further referred Defendant LGpC to testimony of Parillo before the Town of Queensbury Zoning Board of Appeals in a related matter previously before that body, and, upon information and belief, statements made to that body by Parillo in apparent contradiction to the position taken by Applicant Parillo before Defendant LGpC.

499. Plaintiffs also referred Defendant LGpC to issues previously raised before the sub-committee of Defendant LGpC concerning parking, safety factors and hazardous conditions created as a result of such parking, specifically relating to parking along the Bay Road (County road by use) right-of-way, adequacy of size of parking spaces, and jurisdiction of Defendant LGpC, the Town of Queensbury, Defendant DOT and other applicable entities.

500. Plaintiffs further asked Defendant LGpC to direct its attention to questions regarding the property line(s) in the area of the brook and the docks along the brook which also are the subject of the Parillo Application, the proper location of property lines in the area of the brook, Plaintiffs contended, is key to determination as to the valid

and proper existence of many of the docks in that area.

501. Plaintiffs informed Defendant LGpC that the proper location of that line is key to determining whether or not certain of the Parillo docks in question are on the lands of the State of New York and specifically in areas designated as Forever Wild, areas designated as Critical Environmental area, and/or lands of the Forest Preserve.

502. At the June 25, 1997, meeting Defendant LeBarron specifically was requested to consider the significance of this issue as the representative of Defendant DEC Commissioner and Defendant DEC.

503. Plaintiffs reported to Defendant LGpC that it was and is their belief that a survey of the area in question is or should be in the possession of Defendant DEC, the successor in interest to a least a portion of said property from the Nature Conservancy which took title from Plaintiffs.

504. Plaintiffs pointed out to Defendant LGpC that ownership of the underlying title is essential to the validation of the issuance of any Marina Permit(s) by Defendant LGpC for the area in question.

505. Plaintiffs pointed out to Defendant LGpC that specifically at issue is the location of the property line either at the center of the brook or on the East bank.

506. At that time, Plaintiffs brought to the attention of Defendant LGpC the fact that critical to the determination of the status of the Parillo Class A Marina Permit was the determination of the applicable jurisdiction of overlapping State and Municipal entities.

507. Plaintiffs contended that definition of lines of responsibility for issues of zoning, permitting and title determination needed to be resolved before permit issuance in accordance with all applicable laws, rules and

regulations.

JURISDICTION

508. This is an action of law to redress the deprivation under color of statute, custom or usage of a right, privilege and immunity secured to Plaintiffs by the Fourteenth Amendment to the Constitution of the United States and Title 42 of the United States Code, The Public Health and Welfare, Section 1983, and arising under the laws and statutes of the State of New York.

509. This is also an action of law to redress the deprivation through a conspiracy on the part of Defendants acting under color of statute, custom, and usage of a right, privilege and immunity secured to the Plaintiffs by Title 42, Section 1985(3) arising under the laws and statutes of the State of New York.

510. This is also an action under the First Amendment, Fourth Amendment and Fifth to the Constitution of the United States and Title 42 of the United States Code, The Public Health and Welfare, Section 1983, and 1985.

511. This is also an action under the Fourteenth Amendment to the Constitution of the United States and Title 28 of the United States Code, The Public Health and Welfare, Section 1983, and 1985(3).

512. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. sections 451, 1331, 1337, 1343 and 1345.

513. The actions of Defendants, both individually and collectively, have violated Plaintiffs' rights of free speech, freedom of association and freedom to petition government under the First and Fourteenth Amendments of

the United States Constitution.

514. The actions of Defendants, both individually and collectively, have violated the rights of Plaintiffs to petition the government.

515. The actions of Defendants, both individually and collectively, have violated the rights of Plaintiffs in the conduct of their business and said acts of Defendants are in violation of Plaintiffs' rights under 15 U.S.C Section 1 in restraint of trade.

516. The actions of Defendants, both individually and collectively, have violated Plaintiffs' rights by in derogation of the Article 1, Section 9, Clause 3 of the United States Constitution by applying to Plaintiffs ex post facto law and regulation.

517. The actions of Defendants, both individually and collectively, have violated Plaintiffs' rights in derogation of the commerce clause of the Untied States Constitution, Article 1, Section 8, Clause 3.

518. All of the acts alleged herein were committed by the Defendants herein within the territorial jurisdiction of the Northern District of New York.

519. Proper venue is in this Court as the unlawful action occurred within this District.

AS AND FOR A FIRST CAUSE OF ACTION, PLAINTIFFS ALLEGE

520. Plaintiffs repeat and reallege each and every allegation contained in paragraphs numbered "1" through "519" of this Complaint as if more fully and at length set forth herein.

521. Defendants herein have individually and collectively acted in such a manner as to create a negative business environment for the Plaintiffs herein, despite repeated efforts made by Plaintiffs to seek only the rights due Plaintiffs.

522. Those efforts of Defendants even expanded beyond just the taking of Plaintiffs's property by their effective seizure of Plaintiffs's property interests, but also expanded to place Plaintiffs, commercial operation and personal reputation up to ridicule by the public with the charges and legal threats and allegations made against Plaintiffs and by placing Plaintiffs "on display" as an object of ridicule with respect to the uses to which they put their property by making such matters the subject of legal proceedings purportedly for the purpose of engaging in regulatory enforcement.

523. These actions have placed the Plaintiffs in a position where they are threatened with the loss of their Marina Permit through and enforcement action based upon false charges to be prosecuted by Defendants following the Defendants' initial and continuing illegal and unconstitutional actions of keeping their from proceeding with legal uses of their property.

524. Defendants herein have purposely carried on efforts to intimidate and harass the Plaintiffs by using every means up through and including threat of seizing their business and personal property, thereby making Plaintiffs' continued business operation all but untenable.

525. This discrimination by Defendants is carried on under color of State law and under color of custom and usage enforced by the officials of Defendant LGpC.

526. The actions of Defendants complained of have caused Plaintiffs to be threatened with the loss of their legally granted marina permit issued which is integral to

their business, to incur expenses and to suffer damage to their business, loss of potential future business and business reputation as well as personal anger and stress.

AS AND FOR A SECOND CAUSE OF ACTION, PLAINTIFFS ALLEGE

527. Plaintiffs repeat and reallege each and every allegation contained in paragraphs numbered "1" through "526" hereof as if more full and at length set forth herein.

528. The actions of Defendant Auffredou and the individual Defendants violated Plaintiffs' right of free speech under the First and Fourteenth Amendments of the United States Constitution.

529. Plaintiffs have, as citizens of the United States, residents of the State of New York and resident within the territorial boundaries of the Town of Queensbury raised issues concerning improper use of power and authority by officials of Defendant LGpC and raised issues concerning the inequitable application of ordinances and rules by Defendant LGpC and officials, agents, servants and employees of Defendant LGpC with respect to resident and land owners targeted by Defendants within their jurisdictional boundaries, all based upon Plaintiffs' personal knowledge of applicable facts.

530. Plaintiffs also challenged certain actions of officials of the State of New York, members of the same political party to which individual Defendants named herein owe their allegiance and from which political party said individual Defendants derive their political power.

531. Plaintiffs's actions with respect to appointed State officials resulted in Plaintiffs challenging actions taken against them by those persons in several legal forums,

including but not limited to the New York State Supreme Court and Defendant LGpC itself.

532. The above actions of Plaintiffs were and are matters of public record.

533. It was following and during the course of Plaintiffs' challenges to the bureaucratic then entrenched hierarchy of Defendant LGpC that Defendants commenced the above actions against Plaintiffs.

534. The actions of Defendants effectively placed Plaintiffs under threat of legal prosecution and seizure of assets.

535. All of the above recited actions of Defendants are in direct derogation of State Law, Rules, Regulations and policy and applicable Federal Law.

536. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential future business and damage to their business reputation as well as personal anger and stress.

AS AND FOR A THIRD CAUSE OF ACTION OF ACTION, PLAINTIFFS ALLEGE

537. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "536" hereof as if more full and at length set forth herein.

538. Plaintiffs found themselves the objects of Defendants' actions whereby Plaintiffs was more closely scrutinized than other similarly situated property owners within the territorial limits of Defendants LGpC through selectively enforcing the Regulations of Defendant LGpC.

539. Plaintiffs were ostracized by the individual

Defendants while attempting to construct a pretextural reason for forcing them to close their business, all while attempting to provoke Plaintiffs enough to create a pretext for enforcement actions against them and making every attempt to undermine the basic rights to which Plaintiffs are entitled under the Constitution.

540. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential future business and damage to their business reputation as well as personal anger and stress.

AS AND FOR A FOURTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

541. Plaintiff repeat and reallege each and every allegation contained in paragraphs "1" through "540" hereof as if more full and at length set forth herein.

542. The actions of Defendants LGpC were maliciously designed to bring discredit upon the Plaintiffs before their family, friends, neighbors and associates.

543. Through the public charge of Defendant LGpC, its employees and agents that Plaintiffs had illegally constructed dock extensions which Defendants alleged were in violation of the law and was a planned, calculated attempt to maliciously, publicly to slander and libel the Plaintiffs.

544. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential future business and damage to their business reputation as well as personal anger and stress.

AS AND FOR A FIFTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

545. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "544" hereof as if more full and at length set forth herein.

546. Plaintiffs found themselves the object of a review process which actually was an investigation which superficially, upon information and belief, was described as being an investigation into the actions of a property owner trying to preserve their property in the face of continual regulatory enforcement by Defendant LGpC.

547. The actions of Defendant LGpC, its employees and agents in failing to "grandfather" prior existing recreational uses constitutes an ex post facto regulation in violation of the Untied States Constitution.

548. The actions complained of in this Complaint were a result of Plaintiffs's opposition to the illegal and improper practices of the Defendants which they reasonably believe to be a clear form of retaliation against them.

549. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential business and damage to their business reputation as well as personal anger and stress.

AS AND FOR AN SIXTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

550. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "549" as if fully set forth herein.

551. Pursuant to the requirements of the Town of Queensbury's Zoning Code in its application and interpretation thereof as applied to Plaintiffs' property is another example of the actions of Defendants impinging on and violating the rights of Plaintiffs.

552. At all times hereinafter mentioned, Plaintiffs as a property owners within the Town of Queensbury and citizens of the United States, Plaintiffs were and are entitled to the privileges and immunities afforded their as a result of said citizenship.

553. Upon information and belief, Plaintiffs' property has been targeted by the Town of Queensbury, its employees and agents, for specific action not authorized by or contemplated in the existing zoning scheme of the Town of Queensbury at the request or direction of Defendant LGpC.

554. Defendant LGpC and the Town of Queensbury, acting at Defendant LGpC's request or direction, knew or had reason to know that the acts of selective enforcement and excessive regulation would cause Plaintiffs damage.

555. Plaintiffs were singled out by Defendants for abusive action in retaliation for their course of conduct seeking to obtain the rights and privileges to which they were and are entitled.

556. Defendants knew or had reason to know that Plaintiffs were engaged in a commercial business whose clientele come from throughout the Untied States and from foreign countries.

557. Defendants engaged in a course of conduct of continuous harassment, the end result of which was to interfere with and reduce Plaintiffs' business in violation of the Commerce Clause of the United States Constitution.

558. As a direct result of the actions complained of

Defendants both individually and collectively, Plaintiffs suffered damage.

559. Upon information and belief, Defendants' violation of Plaintiffs' rights is a proximate cause of injury to Plaintiffs.

560. The injuries sustained by Plaintiffs were not due to any contributory negligence on behalf of Plaintiffs.

561. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential future business and damage to their business reputation as well as personal anger and stress.

AS AND FOR A SEVENTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

562. Plaintiffs repeat and reallege each and every allegation contained in paragraphs numbered "1" through "561" hereof as if more fully and at length set forth.

563. Upon information and belief, Defendants are liable for tort in said Defendants' adoption of an inadequate and inherently defective regulatory system which is overlapping, conflict ridden and excessive the legislative authority given them

564. Upon information and belief, Defendants are liable for tort in said Defendants' inequitable application of Defendants Regulations with respect to Plaintiffs.

565. Upon information and belief, at all times mentioned herein, Defendants failed to use even slight care in said Defendants' duty to protect and fully warn Plaintiffs as a property owners within Defendants' zone of influence of the intended application of its legally defective and ambiguous regulatory system with respect to Plaintiffs and

engaged in conduct that is so careless as to show complete disregard for the rights and safety of Plaintiffs.

566. Upon information and belief, Defendants are liable for gross negligence.

567. Upon information and belief, Defendants are also liable for willful misconduct.

568. Upon information and belief, Defendants have intentionally acted or neglected to act knowing that their conduct will probably result in injury or damage to Plaintiffs.

569. Upon information and belief, Defendants are liable for their gross and continuing negligence and their willful misconduct towards Plaintiffs resulting in damage to Plaintiffs.

570. Upon information and belief, Defendants are liable for their gross and continuing negligence and their willful misconduct towards Plaintiffs resulting in Plaintiffs's injuries.

571. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential future business and damage to their business reputation as well as personal anger and stress.

AS AND FOR AN EIGHTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

572. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "571" hereof as if more full and at length set forth herein.

573. Plaintiffs found themselves the object of Defendants' actions whereby Plaintiffs became the subject of

and the object of attack and scrutiny in a New York State Court proceeding wherein Plaintiffs found that they had no available rights or remedies under the laws of the State of New York.

574. Plaintiffs was slandered, defamed and attacked in litigation as a PRETEXTURAL reason for Defendants purported enforcement and others to "punish" Plaintiffs for the attempted exercise their legally available rights with respect to, upon information and belief, political allies and cronies of Defendants.

575. Defendants knowingly caused holds to be placed upon Plaintiffs' personal assets in violation of State law as a part of this enforcement action.

576. Defendant LGpC, acting under color of state law, engaged in a course of conduct intended to deprive Plaintiffs of their constitutionally afforded rights to property while attempting to provoke Plaintiffs in a setting in which Plaintiffs has no rights, enough to create a pretext for their false claims against their and making every attempt to undermine Plaintiffs's credibility the Court.

577. This intent was clearly underscored by the comments of Defendant Auffredou at the April 29, 1998 meeting of Defendant LGpC, setting forth the intent to "go after" Plaintiffs' personal assets and circumvent any protection of corporate existence which might exist.

578. This intent is further underscored by the actions of Defendant LGpC and its representatives in seeking attachment and seizure of Plaintiffs' personal assets in the New York State Court proceeding when Defendant LGpC and their agents were fully aware that Plaintiffs operated their businesses in a corporate form.

579. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential future business and damage to their

business reputation as well as personal anger and stress.

AS AND FOR A NINTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

580. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "579" hereof as if more full and at length set forth herein.

581. Plaintiffs found themselves and their assets as the target of attack in the above mentioned Supreme Court enforcement proceedings.

582. Plaintiffs quickly found that, as Defendants White and Gallagher proceeded to change the charges against Plaintiffs at will and without notice to Plaintiffs, they effectively found themselves without the ability to defend themselves and their interests within the existing structure of the purported marina permit review process which had in effect been converted into an enforcement proceeding being run as a Star Chamber proceeding by Defendant LGpC and its personnel.

583. Whenever Plaintiffs attempted to defend themselves within the existing confines of Defendant LGpC's procedures, they found that, since Defendant LGpC "owned the football", it could change the rules of the "game" at will, first alleging that Plaintiffs was in violation for running an alleged "quick launch operation", then another variation and then an alleged "boat launching facility" within the same proceeding, resulting in the denial of Plaintiffs of the basic right to know the charges against their so that they could defend themselves and protect their property rights.

584. The Defendants LGpC and its agents and employees have engaged in "fluid" definition of terms which

renders Plaintiffs' compliance with their requests or compliance impossible.

585. Plaintiffs actively participated in the marina application review process of two (2) other commercial entities, the Dunham's Bay Boat Company and an operation run by Frank J. Parillo.

586. The procedures used in the review of those marina permit applications as well as the definitions applied thereto were markedly different than that applied to Plaintiffs' applications.

587. As a direct result of the foregoing actions by Defendants herein, acting under color of state law, Plaintiffs have been and are denied Equal Protection of the laws and Due Process as guaranteed to Plaintiffs under and by virtue of the Constitution of the United States.

588. Defendants sought individually and in concert, acting under color of state law, to deprive Plaintiffs of their rights and privileges as citizens of the United States pursuant to the First and Fourteenth Amendments to the United States Constitution.

589. All of the above is in direct derogation of State Law, Rules, Regulations and policy and applicable Federal Law.

590. The actions of Defendants complained of have caused Plaintiffs to incur expenses and suffer loss of business and potential future business and damage to their business reputation as well as personal anger and stress.

AS AND FOR A TENTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

591. Plaintiffs repeat and reallege each and every

allegation contained in paragraphs "1" through "590" hereof as if more full and at length set forth herein.

592. Plaintiffs as the primary target of Defendants LGpC and their cohorts, were rebuffed by Defendant DEC in their attempt to protect themselves and their interests, when they sought intervention from the office of Defendant DEC.

593. The permit under which Plaintiffs have continued to operate was a non-revocable permit issued by Defendant DEC in 1982 as recited heretofore.

594. This permit was not statutorily or by regulation revoked since revocation of a DEC operating permit is and was clearly beyond the scope of Defendant LGpC purported authority.

595. Plaintiffs have continuously attempted to work with Defendants LGpC, its agents and employees, to complete an application for a Class A Marina Permit.

596. Defendant LGpC as heretofore recited repeatedly changed the level of the "bar" over which Plaintiffs must leap in order to obtain a Class A Marina Permit.

597. As stated in the previous causes of action, Defendants LGpC have applied both a close scrutiny examination to Plaintiffs unlike that given other applicants and have continuously changed definitions, interpretations of regulations and application of those regulations by administrative fiat rather than lawful and proper changes.

598. Defendant White admitted specifically with reference to the "grandfathering" of prior recreational uses that Defendant LGpC had deviated from the publically published intent of their regulations with respect to "grandfathering".

599. As a direct result of the foregoing actions by

Defendants herein, Plaintiffs were denied Equal Protection of the laws as guaranteed to Plaintiffs under and by virtue of the Constitution of the United States.

600. Defendant LGpC, while informing Plaintiffs through agents and employees that the charges against Plaintiffs could be changed at will by Defendants and without prior notice to Plaintiffs constitutes a denial of the most basic rights accorded to citizens of the Untied States under the Fifth and Fourteenth Amendments to the United States Constitution.

601. Plaintiffs could not even assert basic First Amendment rights, if they were to have chosen to do so when they were not even informed of the ever changing charges pending against them in the shifting sands of bureaucratic prerogative asserted by Defendants herein.

602. Even in the most egregious criminal cases, under the Constitution of the United States such a proceeding without affording the "accused" of his rights would be in total and complete violation of the constitutional rights and guarantees of the "accused".

603. In the above mentioned ongoing proceedings under the guise of the Marina Permit review process Plaintiffs have been "presumed guilty" of all charges leveled against them by Defendants.

604. Plaintiffs were "presumed guilty" of all charges leveled against them by Defendants without benefit of an opportunity of knowing what standards they had to meet in order to obtain the largess of being granted a Class A Marina Permit.

605. Defendants sought to and did, individually and in concert with each other deprive Plaintiffs of their right of redress guaranteed them by the United States Constitution.

606. The actions complained of as above set forth

were done under color of state law and were done deliberately and with forethought to punish and discriminate against Plaintiffs and were done with callous indifference to their Federally protected rights.

607. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential future business and damage to their business reputation as well as personal anger and stress.

AS AND FOR A ELEVENTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

608. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "607" hereof as if more full and at length set forth herein.

609. The actions, under color of state law, of Defendants were maliciously designed to bring discredit upon the Plaintiffs both before the court and the public, a factor of significant import to Plaintiffs since their reputation was and is of significant import to them and their business.

610. The actions of Defendants in their attempts to discredit Plaintiffs constituted a planned and calculated attempt to maliciously, publicly to slander and libel the Plaintiffs.

611. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential future business and damage to their business reputation as well as personal anger and stress.

AS AND FOR A TWELFTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

612. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "611" as if fully set forth herein.

613. Plaintiffs under their First Amendment rights of freedom of speech and association and their Fourth Amendment right to a redress of their grievances, often have chosen successfully to challenge numerous governmental officials and entities thorough pro se court challenges.

614. These challenges on several occasions have involved one or more of the named Defendants, their employees and agents.

615. All of the Defendants individually and in concert have purposefully chosen to selectively enforce and to treat Plaintiffs in a discriminatory manner different from other similarly situated citizens in retaliation for Plaintiffs' efforts to exercise their civil rights in violation of Plaintiffs' rights to Due Process guaranteed them by the Fourteenth Amendment to the United States Constitution.

616. As a result of the above, Defendants have cause harm and damage to Plaintiffs.

AS AND FOR A THIRTEENTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

617. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "616" as if fully set forth herein.

618. For years, Plaintiffs' property has been used by ambulance, police, and others involved in rescues or emergency situations at the south end of Lake George.

619. The location of Plaintiffs' property and the ease of accessibility to the water for emergency vehicles has been

utilized on numerous occasions to assist in rescue operations.

620. In the past, ambulances have backed down to the water's edge to effectuate transport of individuals requiring emergency medical services.

621. Since the area in question is sandy, in the past vehicles, including emergency medical transport vehicles have experienced difficulties in maneuvering in this area and in making a speedy exit from the water area.

622. For many years since Plaintiffs purchased the property, the North Queensbury Volunteer Fire Co. and the North Queensbury Rescue Squad have utilized our property for drills, practice, as well as in actual emergency situations.

623. Plaintiffs have viewed this usage of their property as something which any property owner having useful facilities as being ready and willing to provide both in emergencies and when requested by such entities serving public needs.

624. In the past, Plaintiffs have had both employees and guests with physical handicaps.

625. During 1999, Plaintiffs have had in their employ one physically handicapped person involved in recreational activities.

626. It is anticipated that Plaintiffs will have handicapped guest in the future.

627. Plaintiffs always have attempted to provide to such handicapped persons the best access they have available to them so that such persons may enjoy Plaintiffs' exercise and recreation facilities and amenities along with those not suffering from such handicaps.

628. Plaintiffs noted handicapped guest who are confined to use of artificial ambulatory devices having

difficulty in maneuvering so as to gain barrier free access to Lake waters.

629. The sandy nature of the soil, without a firmer subsurface, further hampers mobility of such handicapped persons.

630. By letter dated May 7, 1999, Plaintiff John Salvador, Jr. corresponded with Chris Round, hereinafter referred to as "Round", the Executive Director of the Town of Queensbury Community Development Department, advising him of Plaintiffs' intention to construct a Handicap and Emergency Access facility on Plaintiffs' property.

631. In that correspondence, Plaintiff provided Round with a sketch showing the proposed location of the facility and its relationship to the means of ingress and egress.

632. Plaintiffs informed Round that the facility was to be located on parcel identified as tax parcel 4-1-11, located in a WR-1A Zone, and also in one of the Town of Queensbury's Vessel Regulation zones as well as the Lake George Recreation Zone and the Lake George park Recreation Zone..

633. Plaintiff told Round that the facility would be constructed entirely on property owned by Plaintiffs, and would not be constructed on or disturb any Public Lands.

634. Plaintiff stated that the project would not be included in the Adirondack Park Agency's recently established Deep Water Marsh area and that no wet lands would be disturbed or impacted by the project.

635. By letter dated May 12, 1999, Craig Brown, hereinafter referred to as "Brown", the Code Compliance Officer of the Town of Queensbury, responded to my request stating that he had reviewed Plaintiffs' correspondence.

636. Brown stated that he had visited the site on May 11, 1999, and had determined that it involved a hard surfaced access facility, part of which would be within 50 feet of the shoreline of Lake George, requiring Planning Board review through the site Plan Review process.

637. Brown stated that the deadline for June 1999 consideration for inclusion on the Planning Board agenda was May 26, 1999.

638. By letter dated May 24, 1999, Plaintiffs responded to Round and provided for submission in support of Plaintiffs' application, a cross-section sketch of the proposed Handicap and Emergency Access Facility.

639. Plaintiffs requested Round's position on whether some form of Site Plan Review would be required for the project as proposed, and requested that if it were required, that this project be considered for inclusion on the June 1999 Planning Board Agenda.

640. On May 26, 1999, Plaintiffs submitted a Site Plan Application for the proposed Handicap And Emergency Access Facility.

641. By letter dated June 3, 1999, Round notified Plaintiffs that the proposed project had been placed on the Agenda of the Warren County Planning Board for June 9, 1999, and on the Agenda of the Queensbury Planning Board for June 22, 1999. a. On June 9, 1999, the Warren County Planning Board considered the proposed project as presented.

642. Plaintiff John Salvador, Jr. attended that meeting and made a presentation concerning the proposed facility.

643. Plaintiffs further state that they would make the site available for the installation of a dry hydrant.

644. Included in the June 9, 1999, minutes of the

Warren County Planning Board, that body, by Resolution QBY-SPR-25-99.

645. The Warren County Planning Board unanimously adopted a resolution to approve the proposed site plan with the statement that the project would have "a good County impact."

646. The matter of the Handicap and Emergency Access Facility was on the agenda of the Planning Board meeting for June 22, 1999.

647. Plaintiffs attended the meeting of the Planning Board held on June 22, 1999.

648. The agenda for that meeting listed the application of Dunham's Bay Boat & Beach Club as Site Plan No. 25-99 and Type as Unlisted.

649. The Agenda for that meeting listed Plaintiffs as the owners of the real property and listed the Zone in which the property is located as WR-1A, CEA, APA.

650. The agenda incorrectly listed the location as 2999 State Route 9L.

651. The proper location identification should have read "18 Dunham Bay Road"; however, the 2999 State Route 9L address was and is correct for our address, and for the over all address and location of our real property in general.

652. The agenda set forth the purpose of the application as:

> Applicant proposes construction of a Handicap and Emergency Access facility for launching water craft. Hard surfacing within 50 feet of the shoreline requires Planning Board review and approval.

653. At the June 22, 1999, Planning Board meeting,

Plaintiff John Salvador, Jr. presented substantially the same information in support of the application as he had presented to the Warren County Planning Board at its June 9, 1999, meeting.

654. In that presentation, Plaintiff addressed the need for compliance with both the Federal Civil Rights Act of 1964 and the Rehabilitation Act of 1973 as well as the Americans with Disabilities Act of 1990.

655. Plaintiff further discussed the regular usage of their waterfront property by local volunteer units to perform practice for as well as qualification for ice rescue during the winter months, as well as the previously mentioned other seasonal uses for access by guests and members and uses by rescue and fire personnel.

656. Plaintiff noted that the proposed installation of a dry hydrant to facilitate response in the event of an emergency situation requiring quantities of water.

657. As part of the consideration of the proposal at the June 22, 1999, meeting, the Community Development Department of the Town of Queensbury submitted staff notes and recommendation.

658. The Staff note, "the Lake George Park Commission is reviewing the application, no comments have been received."

659. The Recommendation of the Community Development Department was stated as follows:

> Staff would recommend approval of the proposed launch with the condition the use and the construction is in compliance with the Lake George Park Commission and other regulatory agencies.

660. At page 20, et seq. the minutes of the Planning

Board for June 22, 1999, set forth the discussion and consideration of this application.

661. As reflected in those minutes, Plaintiff John Salvador, Jr. responded to questions and clarified certain points concerning the proposal for the Planning Board.

662. Plaintiff stated that the handicap usage would be limited to registered guests and members of the Boat and Beach Club, and not a facility open to the public at large.

663. Plaintiff also corrected a few technical items which had been misstated in the Planning Board Agenda for the record.

664. When the Public Hearing portion of the Planning Board Agenda on this item was opened, a letter was read into the record dated June 18, 1999, addressed to Round.

665. The letter was stated as signed by Mark T. Sweeney, hereinafter referred to as "Sweeney", of the law firm of Shanley, Sweeney, Reilly & Allen, P.C., and stated that they represented Frank J. Parillo, hereinafter referred to as "Parillo", a neighbor.

666. The letter, according to the minutes, stated in pertinent part:

> I am writing on behalf to object to the Salvador's application to construct a Handicapped and Emergency Launch facility for watercraft. . . . such and expanded facility would qualify as a "Boat Launch" under LGPC regulations and would therefore require the Applicant to obtain an amendment to its Permit. It is my understanding that no such application has been made at this time. 2. Specifically, the LGPC has limited the scope of the facilities

> operation of the Applicant as follows: The Applicant is prohibited from operating a Quick Launch . . . . 3. The LGPC's strict limitation of the Applicants' use of their beach area for launching and retrieving vessels by "each registered guest" and "each berthing guest" only during the term of their stay, evidences the LGPC's intent to limit the use of the beach area for launches and is contrary to the application submitted by the Salvadors. . . . 4. Due to the limited usage of the launch allowed by the LGPC, the expanded capability of the improved launch is unnecessary and susceptible of abuse as a non-permitted boat launch. Accordingly, we request that the Salvador's application be denied as contrary to the terms and intent of the Draft LGPC Marina Permit for this facility.

667. Next, a further faxed communication from Sweeney was read into the record.

668. According to the minutes, this communication was faxed on June 22, 1999, and also was addressed to Round.

669. In that communication, as set forth in the minutes, Sweeney, on behalf of Parillo, alleged:

> 1. Construction and operation of a commercial-type boat launch at this location is contrary to the letter and intent of the Waterfront Residential Zones (Queensbury Code § 179-60). a. As the Dunham's Bay Boat and Beach Club is a non-conforming enterprise within the WR-1A zone the Salvadors hereby seek to improperly expand

> a non-conforming use without obtaining a variance per Queensbury Code § 179-79(D). . . . no proper application has been submitted by the Salvadors per Queensbury Code § 179-34 thereby denying the Planning Board, the general public, and adjoining landowners in particular, the ability to analyze the potential significant environmental impacts the commercial-type boat launch would entail. . . . Whether it would follow the intent of the district regulations or the Town's new Comprehensive Land Use Plan; . . . .

670. Continuing, and seeming entirely to miss the point and purpose of the proposal, Sweeney claimed that our proposed Handicap and Emergency Access facility failed to address issues, including "Fire and emergency access".

671. According to the minutes, Sweeney concluded:

> Accordingly, we request that the Salvadors' application be denied as (a) contrary to the express requirements of the WR-1A zone, (b) an illegal expansion of a non-conforming use without a variance or variance modification, (c) lacking other required permits and approvals and (d) as contrary to the objectives and guidelines for regional projects under the Queensbury Code.

672. Following the reading o the two (2) Sweeney communications into the record, Planning Board Chairman MacEwan, asked counsel to the Planning Board Mark Schachner, hereinafter referred to as "Schachner" for his opinion concerning the Parillo-Sweeney statements.

673. Schachner referred to the recommendation of Staff and the need for compliance with Defendant LGpC's requirements; however, with respect to other matters referred to in the Parillo-Sweeney objections, Schachner is quoted in the minutes as stating:

> I did not, as far as the other concerns addressed in that letter relative to the goals and objectives of the Queensbury Zoning Ordinance, I think the Board is familiar with those goals and objectives. I think you can deal with <u>those</u> concerns if you believe they're valid concerns, but my own opinion is that most of that speaks to the issue of State agency jurisdiction, especially the Lake George Park Commission, and that's not really our concern, other than if you want to condition any approval, if that's where you're headed, on compliance with the Lake George Park Commission permit requirements. That's a perfectly appropriate recommendation. [Emphasis supplied]

674. Other members of the Planning followed this comment with statements as follows:

> MR. VOLLARO - The only question I have is that that letter that's written continually
>
> refers to a boat launch. It sounds like that what we're dealing with is not a boat launch. That whole letter couches itself in those terms of boat launch, and that's not what this is, as I understand it.

675. In response, as quoted in the minutes of that

meeting, Plaintiff John Salvador, Jr., stated:

> MR. SALVADOR - With regard to the two letters, I would only comment that there's reference made here to a Lake George Park Commission permit that's pending. We have withdrawn that application. That application does not exist. It has been withdrawn, before the Lake George Park Commission. We are operating our marina under a DEC permit granted to us to do the things we do there. That permit was granted in 1982. It's still valid. No one has told us it's invalid.

676. When asked about certain legal issues with respect to Plaintiffs' permit, Schachner stated:

> I believe the issue that Mr. Salvador has just referred to, which is whether or not continued operation of his commercial, Class A Marina requires Lake George Park commission approval is subject to dispute. . . . If you're heading in this direction, you could certainly take the Staff recommendation, which I believe is for approval conditioned on compliance with the Lake George Park Commission permitting requirements. You could add the phrase "if any", in which case if Mr. Salvador is correct and there is no requirement of the Lake George Park Commission here, then your approval condition would be fulfilled, but I will tell you that I'm quite certain that the Lake George Park Commission believes that there is a Class A Marina operating, that it does require their approval, and that it's a

violation of State law to not have that approval. In other words, the State agency in question, the Lake George Park Commission, does not agree with the Salvadors' contention that they can lawfully continue to operate this Marina under their DEC permit, issued in 1982. Than's my understanding.

677. Plaintiff responded to Schachner, and the dialogue on the record was as follows:

MR. SALVADOR - We are presently operating under a DEC permit, okay. That's what we're doing now. There is a dispute, that is correct.

MR. SCHACHNER - That's what I said.

MR. SALVADOR - But it's not over the fact that we don't need a Class A Marina Permit. It's over the fact that the level of uses they think we are entitled to, that's the dispute.

MR. SCHACHNER - . . . . My point stands, which is there is a dispute between the Salvadors and the Lake George Park Commission, as to whether, and/or what type, of Class a Marina permit they need from that Agency. None of this, in my opinion, has very much to do with the application before us. I would reiterate that the Staff recommendation seems very logical and very rationale and very appropriate, and I think that's one way you can go on this if your like.

678. Thereafter, Plaintiff John Salvador, Jr. responded in detail to the allegations set forth in the Parillo-

Sweeney letters.

679. Plaintiffs stated that neither Sweeney nor Parillo appeared in person at the hearing to respond to questions on issues which they raised.

680. Plaintiffs further stated on the record, as follows:

> This letter before us refers to a launch, and it is not a launch. It could be used for that, for our guests, as our launch facility is used at the present time. We presently launch boats, and I have photographs here I can show you. We presently launch boats. It is classified as an unimproved launch area. That's what it is. This letter talks about, the applicant is prohibited from operating a Quick Launch. We have made no claim that we're operating a Quick Launch, absolutely no claim that we're in the Quick Launch business. The launch at this facility is not open to the general public. Our facility is a commercial operation. There's no way we can deny the public services. That's what we're permitted to do. We give those services to people who register with us, and who pay their fees to be on our premises. That is commercial activity. We have permits to do it. We are licensed to do it, and that's what we do. We operate within those permits. . . . The applicant's ability to launch and retrieve vessels has been specifically limited by the Lake George Park Commission to each registered guest and each berthing customer. We agree. . . . There's talk, in Paragraph 3 about a paved launch. This launch ramp will not be paved. There is no paving in that cross section of

> sketch. . . . No paving. The second letter, construction and operation of a commercial type boat launch at this location. Again, we are a commercial activity. . . . We've been a pre-existing, non-conforming use. We understand that. Every aspect of it. It's a residential zone. . . . There will be no more use than there already is now. There just cannot be anymore use than we already have. It'll just be more convenient. It'll be up to standard for the handicapped people, and believe me, we have these guests. . . .

681. Plaintiff John Salvador, Jr., continued in his response to the allegations made.

682. Thereafter, Resolution No. 25-99 was moved and seconded.

683. Planning Board Resolution 25-99 was then adopted by unanimous vote of the members of the Planning Board, finding,

> . . . the action about to be undertaken by this board will have no significant environmental effect and the Chairman of the Planning Board is hereby authorized to execute and sign and file as may be necessary a statement of non-significance or a negative declaration that may be required by law.

684. Thereafter, Motion to Approve Site Plan No. 25-99 Dunham's Bay Boat & Beach Club was moved and seconded.

685. By unanimous vote the Planning Board adopted the following:

> 1. The Town Planning Board, after

considering the above, hereby moves to approve Site Plan No. 25-99 - Dunham's Bay Boat & Beach Club.

2. The applicant shall present three (3) copies of the above referenced site plan to the Zoning Administrator for his signature.

3. The Zoning Administrator is hereby authorized to sign the resolution.

4. The applicant agrees to the conditions set forth in this resolution.

5. The conditions shall be noted on the map.

6. The issuance of permits is conditioned on compliance and continued compliance with the Zoning Ordinance and site plan approval process.

686. Following a further very brief discussion, the portion of the hearing relevant to the applicant in question ended.

687. By letter dated June 22, 1999, Roger Howard, hereinafter referred to as "Howard", writing on letter head of Dunham's Bay Sea Ray, corresponded with the Planning Board.

688. In that correspondence, Howard set forth three (3) items, overcrowding, pollution and traffic and pedestrian safety as a basis for opposition to the proposed project.

689. Howard specifically stated "I strongly object to the project . . . " [Emphasis supplied].

690. By letter dated June 22, 1999, from Defendant LGpC, addressed to Plaintiffs, Plaintiffs were informed as follows:

> Please be advised that the referenced project involves the construction of a boat launch and requires a permit from the Commission pursuant to 6NYCRR 646-1.2(a)(1) prior to construction since the project alters and expands the launch facilities of Dunham's Bay Lodge and expands the number or type of services or recreational activities offered.
>
> It appears that the project also requires a permit pursuant to Article 15 of the Environmental Conservation Law, 6NYCRR 608 for the placement of fill below the mean high water level of Lake George. You should obtain a determination and, if required, a permit pursuant to Article 15 ECL from NYS Department of Environmental Conservation before commencing construction.

691. By letter dated June 23, 1999, from Round, Plaintiffs were officially informed of the favorable determination and vote of the Planning Board at its June 22, 1999, meeting on our proposed project.

692. On June 26, 1999, Plaintiffs responded to Round's letter and requests and to provided to him a further cross-section sketch of the facility.

693. Also on June 26, 1999, Plaintiffs wrote to Craig MacEwan, hereinafter referred to as "MacEwan", the

Chairman of the Planning Board concerning the approval of Resolution Site Plan No. 25-99 for the proposed project.

694. In that correspondence Plaintiff raised concerns about the language contained in the Resolution as adopted by the Planning Board.

695. Specifically, Plaintiffs pointed out:

> It never was our intention to undertake work of an up-to-standard handicap and emergency access facility in a manner which would confine its future use to that of "launching of water craft". . . . You will note from this registration that more than just watercraft have utilized our present launch area. . . . Unless we can obtain some kind of waiver, this proposed facility must be designed to handle on a year-round basis, the exercise and recreation activities of the handicapped as well as those involved in emergency services.
>
> Finally, does the motion as written allow for emergency vehicle use and access unless the emergency vehicle is a "watercraft"?
>
> . . . .
>
> It is essential that this "launching of watercraft" limitation be clarified in order for us to determine which regulatory agencies might be jurisdictional.

696. By letter dated June 29, 1999, Plaintiff John Salvador, Jr. wrote to Defendant White, responding to White's prior correspondence concerning the project. On or about June 29, 1999, in response to Plaintiffs' request,

Plaintiffs received a copy of a Design Packet from the Independent Living Center.

697. At the July 20, 1999, meeting of the Planning Board, the Planning Board, a motion was made and seconded to approve a modification of Site Plan 25-99 for Dunhams [sic.] Bay Boat and Beach Club.

698. The motion was adopted by vote of five (5) in favor, none opposed, and one (1) abstention.

699. By that motion, the Planning Board specified as follows:

> In accordance with the way the modification is made, for lake access is still correct. The Planning Board has determined, also, that there is no significant change in the site plan modification and further finds that there is no sufficient change to the original SEQRA findings. We're revising the original motion to delete the phrase that dimension drawings should be submitted prior to issuance of a building permit, and also we're taking out the phrase "For launching of water craft", and replacing that "For lake access", as per 7/20/99 revised resolution.

700. By letter dated July 24, 1999, Plaintiffs wrote to Richard Wild, hereinafter referred to as "Wild", in his capacity as Regional Permit Administrator, Region 5, NYS Department of Environmental Conservation.

701. In that correspondence, Plaintiff referred to the items set forth in the Resolution of the Planning Board with respect to the project:

> One of the stipulations introduced by Counsel to the Queensbury Town Planning Board and made a part of the approval

resolution is that "the use and the construction is in compliance with the Lake George park Commission and other regulatory agencies." We assume that Counsel has referred to compliance with the Governor's February 1998 program for "Wetland and Waterfront Development Permits".

702. In that correspondence, Plaintiffs referred to the steps which had already been taken by them with respect to the project and determination of necessary approvals.

703. Plaintiffs specified as follows:

> Concerning this project, we made contact with Al Bauder, Submerged Lands Manager with the State Bureau of Land Management at the Office of General Services. We were able to point out to Mr. Bauder that because this facility when finished will not occupy nor disturb any Public Lands; a land easement from the O.G.S. should not be required. He concurred and further suggested that the D.E.C. might better serve as the coordinating agency for the facility described herein. To this end, we are forwarding a complete set of "Joint Application for Permit" taken from the governor's program packet. We would like your confirmation that we will be in conformance with at least the Queensbury Planning Board's Resolution as it requires us to obtain all use and construction permits required from the un-named regulatory agencies.

704. Plaintiffs provided additional information

therewith to assist in determination of the jurisdictional interest and limits.

705. By letter dated August 2, 1999, Plaintiff John Salvador, Jr. corresponded with Defendant White of the LGpC.

706. Plaintiffs explained therein their need to comply with the Americans with Disabilities Act provisions with respect to barrier-free accommodations and access for the purposes of exercise and recreation for physically and/or mentally handicapped patrons.

707. Plaintiffs also explained the need to provide such accommodations for physically and/or mentally handicapped individuals who might be employed at their facilities.

708. The emergency access portion of the project was explained as follows:

> The emergency access feature of this project should be considered more of a community service undertaking rather than something which might be considered beneficial only to our property and our guests. Without increasing the costs measurably, we can incorporate the means which will allow these facilities to be used by our local emergency services organizations which supply emergency medical and fire protection to the recreation community both on and off the Lake.

709. Rather than expanding any facilities, this project would, in fact, reduce the facilities available at their location, specifically, the removal of approximately 12 feet of the 36 foot section of the "L" shaped duly permitted and authorized dock on Plaintiffs' property.

710. None of the project work would encroach on the Public Lands.

711. All work would be performed up-land of the Mean High-water Level of 320.2 MSL for Lake George.

712. In that correspondence, Plaintiffs explained in detail for the benefit of Defendant LGpC as follows:

> As there is concern that the improvements we are fostering in order to facilitate handicap access for watersports, exercise and recreation may constitute an expansion of our existing operations, we would like to state that, as is with all of our insitu facilities, they are intended for use only by registered lodging guests of Dunham's Bay Lodge and the dues paying members of the Dunham's Bay Boat & Beach Club. The only way an increase in the use of this facility could occur is if we began to draw a greater number of physically and/or mentally handicapped Americans seeking our accommodations for their exercise and/or recreation. Even if this be the case, then only those accommodations which presently represent an under utilization of our allowed usage level could be occupied by such physically and/or mentally handicapped persons. As for facilitating the work-place for physically and/or mentally handicapped persons, we are seeing the need to do everything possible to enhance the desirability of our recreation facility as a place where we can be productively and gainfully employed regardless of a person's handicap.

713. Plaintiffs requested that Defendant LGpC advise whether or not a permit from that agency would be required for project.

714. On or about August 5 or 6, 1999, Plaintiff John Salvador, Jr. spoke with David Wick, concerning our proposed installation of a dry hydrant which Plaintiffs believed would be of assistance to the local fire fighters.

715. By notice dated August 10, 1999, Plaintiffs were advised by Joseph C. Prall, hereinafter referred to as "Prall", of the New York State Department of Environmental Conservation, Division of Environmental Permits, Region 5, Warrensburg Sub-Office, that Plaintiffs' application identified as Application ID #5-5234-00414/00001 for permit relating to Article 15, Title 5: Excavation & Fill in Navigable Waters, and permit relating to § 401 Clean Water Act: Water Quality Certification required additional information.

716. The additional information requested was specified as follows:

> The submission lacked sufficient information to determine jurisdiction. Please advise what excavation or placement of fill below the mean high water mark is proposed. Please show on the enclosed map where the project is and the demensions [sic.].

717. By letter dated August 12, 1999, with attachments, Plaintiffs responded to Prall's request.

718. Plaintiffs first corrected both the applicant name and the facility name as well as the project description on the cover sheet the Prall notification has indicated needed to be attached to the resubmission.

719. As requested by Prall, Plaintiffs indicated on the "location Sketch" by shading the area where the proposed facility was to be located on our waterfront

property.

720. Plaintiffs stated that the small amount of anticipated gravel fill which would be used in the project would be located above the Mean High water level of Lake George.

721. All of the work would take place on Plaintiffs' lands which were submerged under the flood waters of Lake George, not on Public Lands.

722. By letter dated August 12, 1999, from Defendant Gallagher, responding to Plaintiffs' letter of August 2, 1999, referred Plaintiffs to Defendant White's letter of June 22, 1999, with no further explanation.

723. When Plaintiffs initiated this project, they did not anticipated any opposition to improvement of handicap access or provision of better emergency access for community emergency service providers.

724. The last thing which Plaintiffs anticipated was opposition to their compliance with federally mandated requirements for handicap access by governmental entities.

725. Plaintiffs did not anticipate an outcry from their neighbors opposing this project, attempting to veil exclusion of physically and/or mentally handicapped persons from being able to enjoy the use of Lake George.

726. In August 1999, we were served with a Petition-Complaint seeking to prohibit Plaintiffs herein from obtaining building permits, approvals and/or variance for this project based upon the allegations that compliance with Federal Statute (including but not limited to the Americans with Disabilities Act, is in violation of the New York State Town Law, the New York State Environmental Conservation Law, and the Zoning Ordinance of the Town of Queensbury.

727. The issue of whether or not the handicap and

emergency access ramp constituted an expansion of the existing operations has been fully litigated in New York State Supreme Court Warren County in the case of In the Matter of the Application of: Dunham's Bay Boat Co., Inc. and Frank J. Parillo v. The Town of Queensbury Planning Board, The Town of Queensbury, Craig Brown as Code Compliance Officer for the Town of Queensbury, Dunham's Bay Beach and Boat Club, John Salvador, Jr. and Kathleen A. Salvador, bearing Index Number 38303 and RJI number 56-1-99-0474.

728. In a decision handed down by Judge Viscardi, the Court considered the upgrade the area in question, the primary purpose of which is to provide barrier-free access to the Lake for use by their patrons as well as by the personnel of local fire and emergency medical services.

729. The court reviewed the application which included documentation that Plaintiffs' bathing beach, which has long been in existence and use, is classified as an "unimproved" accessway and lacks many characteristics now considered minimal for handicap access rating.

730. As set forth in the pleadings and supporting documentation before Judge Viscardi, Plaintiffs are not only responding to this requirement of the Americans With Disabilities Act as it may affect their patrons, but also are acknowledging their obligation to any of their handicapped employees and to the North Queensbury public service providers who Plaintiffs have allowed to use their unimproved launch facility to perform lake use related rescues as well as provide a means to obtain water for fire fighting.

731. As set forth in that case, Plaintiffs' current unimproved launch is a permitted pre-existing, prior non-conforming uses and, therefore, was and is within the sphere of protection of the law.

732. On or about December 7, 1999, Plaintiffs received a communication from Defendant White writing on behalf of Defendant LGPC concerning the position of Defendant LGpC with respect to the handicap and emergency access facility which has been approved by the Town of Queensbury.

733. In that correspondence, Defendant White states:

> Based upon this record, the **project constitutes construction and operation of a boat launch which the Commission has determined is and expansion of marina activities. Accordingly, construction or operation of the facility will first require a permit from the Commission.**

734. Defendant White continued:

> However, as set forth in our complaint in the matter of the Lake George Park Commission v. John and Kathleen Salvador, you are required to obtain a permit from the Commission pursuant to 6NYCRR 646-1.2 for the operation of your marina along Dunham's Bay.

735. In that litigation, both Plaintiffs and the Town of Queensbury responded and defended the action of the Planning Board in approving the project.

736. As co-defendants, Plaintiffs and the Town prevailed.

737. In the decision handed down by New York State Supreme Court Justice Dominick J. Viscardi, the project was found to be an acceptable use of the non-conforming property.

738. Judge Viscardi found, with great specificity, that the Planning Board's decision approving Plaintiffs' application was neither arbitrary nor capricious nor contrary to law.

739. The Court also held that the provision of such handicap and emergency access at Plaintiffs' facilities ". . . **will not result in any increase in use or change of use than what is already permitted**."

740. In view of this holding as well as the facts, Defendant White and Defendant LGpC are legally wrong in their determination and allegation that ". . . the project constitutes . . . an expansion of marina activities." and that the Commission ". . . will first require a permit from the Commission."

741. The decision of Judge Viscardi is directly in point and constitutes res judicata and collateral estoppel with respect thereto.

742. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential future business and damage to their business reputation as well as personal anger and stress.

743. All of Plaintiffs' losses are continuing.

AS AND FOR A FOURTEENTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

746. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "745" as if fully set forth herein.

747. It has been and continues to be Plaintiffs' position that they are continuing to lawfully operate under their original DEC marina permit.

748. The Defendant LGpC has taken the position the that Plaintiffs' DEC permit is no longer valid despite having no statutory authority for either the revocation or termination of those permits previously issued by the DEC.

749. As evidence of the Defendants' selective enforcement, inconsistent interpretation and purposeful attempts to deny Plaintiffs their constitutional rights to due process and equal protection of the law, Plaintiffs recently received, as part of their continuing efforts to resolve the new dispute concerning the handicapped access, a marina permit application form with a date of April 1998, as its issuance date, with the category on its face "Renewal of DEC Permit".

750. The Plaintiffs were later informed that this form had been sent in error, with a new form without that category attached to that letter.

751. At no time during the pendency of their application before the LGPC did the Plaintiffs ver receive an application form with that category available to them.

752. The sum and substance of this Complaint is Defendants' purposeful, selective administrative, inconsistent standards, and clearly discriminatory treatment toward the Plaintiffs by the Defendants and their employees.

753. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential future business and damage to their business reputation as well as personal anger and stress.

754. All of Plaintiffs' losses are continuing.

WHEREFORE, Plaintiffs respectfully pray that this Court enter judgment for the Plaintiffs, as follows:

1. Against each Defendant in their official capacities the sum of $1,000,000.00 each and in their personal capacity $2,000,000.00 each and; further

2. Ordering Defendants to compensate Plaintiffs for direct and compensatory damages in the amount of $10,000,000.00; and further

3. Ordering Defendants to pay and reimburse Plaintiffs for Court costs and expenditures and legal counsel fees.

4. Ordering Defendants to pay punitive damages for the purposeful and intentional violations of Plaintiffs's constitutional rights in amounts to be determined by this Court.

5. Granting Plaintiffs such further and other relief as the Court may deem just and proper.

DATED: Delmar, New York
December 30, 1999

GALVIN AND MORGAN
Attorneys for Plaintiffs
BY:
/s/ Madeline Sheila Galvin
MADELINE SHEILA GALVIN
Bar Roll No. 101737
/s/ James E. Morgan
JAMES E. MORGAN
Bar Roll No. 103605
217 Delaware Avenue
Delmar, NY 12054
(518) 439-7734

01-7539

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN SALVADOR, JR., and KATHLEEN A. SALVADOR,

Plaintiffs-Appellants,

- against -

THE LAKE GEORGE PARK COMMISSION, *et al.*,

Defendants-Appellees.

APPELLANTS' REPLY BRIEF RESPONDING TO BRIEF OF APPELLEE AUFFREDOU

GALVIN & MORGAN
217 DELAWARE AVENUE
DELMAR, NEW YORK 12054
(518) 439-7734
Attorneys for Plaintiffs-Appellants

ATTORNEY GENERAL
STATE OF NEW YORK
THE CAPITOL
ALBANY, NEW YORK
(518) 474-1191
Attorney for State Appellees

BARTLETT, PONTIFF,
STEWART & RHODES, P.C.
1 Washington Street
Box 2168
Glens Falls, New York 12801
(518) 792-2117
Attorneys for Defendant -Appellee Auffredou

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

UNITED STATES CONSTITUTION iii

FEDERAL STATUTES and RULES iii

STATE STATUTES iii

FEDERAL CASES iii

OTHER AUTHORITIES v

POINT I:

APPELLANTS INCORPORATE BY REFERENCE HEREIN ALL POINTS AND INFORMATION SUBMITTED IN REPLY TO STATE'S RESPONSE TO APPELLANTS BRIEF INCLUDING THE FOLLOWING POINTS 1

I. APPELLANTS FAIL ALL ASPECTS OF THE TEST ESTABLISHED BY THIS COURT IN *McGINTY* v. *NEW YORK*, AND CANNOT BE AFFORDED ELEVENTH AMENDMENT IMMUNITY **1**

II. SALVADORS HAVE MET THEIR BURDEN IN PLEADING A "CASE OR CONTROVERSY" and STATE AND AUFFREDOU HAVE SUBSTANTIATALLY MISREPRESENTED ESSENTIAL FACTS RELATING TO SALVADORS' APPLICATION AND THE COMMISSION'S ACTION THEREON .. **1**

POINT II: **PLAINTIFFS HAVE PLEAD ALLEGATIONS SUFFICIENT TO PRESENT A "CASE OR CONTROVERSY" REVIEWABLE BY FEDERAL COURTS** 1

POINT III: AUFFREDO IGNORES THE FACTS UNDERLYING THE INSTANT ACTION IN THEIR ALLEGATION THAT THERE IS NO CASE OR CONTROVERSY 5

POINT IV: APPELLANTS HAVE ALLEGED RELIEF ADEQUATE TO ESTABLISH CAUSES OF ACTION ENTITLING THEM TO RELIEF UNDER THE ADA AND FOR VIOLATIONS OF

APPELLANTS CIVIL RIGHTS 11

POINT V: SALVADORS HAVE STANDING TO MAINTAIN THE INSTANT ACTION; AFFREDOU AND STATE APPELLEES CONVENIENTLY OMIT REFERENCE TO THE *EX POST FACTO* LAW, RULES AND REGULATIONS APPLIED TO THE SALVADORS 14

CONCLUSION 16

CERTIFICATE OF COMPLIANCE 17

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

Generally 2, 3, 5, 6, 7, 11, 12, 14
Article 1 §10 14
Ex Post Facto 14, 15
First Amendment 13
Fourth Amendment 13
Fifth Amendment 6, 7, 10, 13
Takings Cause 6, 7, 8, 10, 13
Eleventh Amendment 1, 11, 12
Fourteenth Amendment **6, 7, 8, 13**
Due Process Clause 2, 3, 5, 4, 6, 11, 12, 14
Equal Protection Clause 2, 3, 4, 5, 11, 14, 15

FEDERAL STATUTES and RULES

Americans with Disabilities Act (ADA) ... 3, 4, 11

STATE STATUTES

Civil Practice Law and Rules (CPLR)
Article 78 2

FEDERAL CASES

Agins v.City of Tiburon, 447 U.S. 255 (1980) 8, 15, 16

Andrus v Allard, 444 U.S. 51 (1979) 15

Armstrong v United States, 364 U.S. 40 (1960) 8

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 351 (2001) 3

Cantwell v. Connecticut, 310 U.S. 296 (1940) 13

Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897) ... 8

Dube v. State University, 900 F.2d 587 (2d Cir. 1990) 12

Edelman v. Jordan, 415 U.S. 651 (1974) 11

Ex Parte Young, 209 U.S. 123 (1908) 11

Felder v. Casey, 487 U.S. 131 (1988) 10

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) 12

Freedman v. Maryland, 380 U.S. 51 (1965) 13

HBP Associates v. Marsh, 893 F.Supp. 271 11

Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987) 15

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 8

Lucas v. South Carolina Costal Council, 505 U.S. 1003

(1992) 7, 8

MacDonald, Sommers & Frates v. Yolo County, 477 U.S. 340 (1986) 9

McGinty v. New York, 251 F.3d 84 (2d Cir. 2001) 1

Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687(1999) 9

Nollan v. California Costal Comm'n., 483 U.S. 825 (1987) 15

Olson v. United States, 292 U.S. 246 (1934) 10

Palazzolo v. Rhode Island, 121 S. Ct. 2448 ..... 1, 3, 5-10, 11

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) 8, 9

Pennsylvania Coal Co. v Mahon, 260 U.S. 393 (1922) 8, 11, 16

Santiago v. New York State Department of Correctional Services, 945 F.2d 25 (2d Cir. 1991), cert denied, 112 S.Ct. 1168 (1992) 12

Scheuer v. Rhodes, 416 U.S. 232 (1974) 12

Suitum v.Tahoe Regional Planning Agency, 520 U.S. 725 (1997) 9

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 13

Thornhill v. Alabama, 310 U.S. 88 (1940) 14

Thornton v. City of Albany, 831 F.Supp. 970 (N.D.N.Y. 1993) 12

United States v. Grace, 461 U.S. 171, 177 (1983) 13

Williamson County Regional Planning Comm'n. v. HamiltonBank of Johnson City, 473 U.S. 172 (1985) 8, 15

Yee v. City of Escondido, 503 U.S. 519, 112 S. Ct. 1522 (1992) 15, 16

OTHER AUTHORITIES

4 J. Sackman, *Nichols on Eminent Domain* §12.01 (rev. 3d ed. 2000) 10

POINT I

APPELLANTS INCORPORATE BY REFERENCE HEREIN ALL POINTS AND INFORMATION SUBMITTED IN REPLY TO STATE'S RESPONSE TO APPELLANTS BRIEF INCLUDING THE FOLLOWING POINTS: I. APPELLANTS FAIL ALL ASPECTS OF THE TEST ESTABLISHED BY THIS COURT IN *McGINTY* v. *NEW YORK*, AND CANNOT BE AFFORDED ELEVENTH AMENDMENT IMMUNITY

II. SALVADORS HAVE MET THEIR BURDEN IN PLEADING A "CASE OR CONTROVERSY" and A. STATE AND AUFFREDOU HAVE SUBSTANTIATALLY MISREPRESENTED ESSENTIAL FACTS RELATING TO SALVADORS' APPLICATION AND THE COMMISSION'S ACTION THEREON.

POINT II

PLAINTIFFS HAVE PLEAD ALLEGATIONS SUFFICIENT TO PRESENT A "CASE OR CONTROVERSY" REVIEWABLE BY FEDERAL COURTS

The Salvadors plead allegations sufficient to present a "case or controversy" properly rev-iewable by Federal Courts. John Salvador, Jr. and Kathleen A. Salvador, Plaintiffs-Appellants[7] have fully set forth the basis for Federal jurisdiction in the instant case in the pleadings already before this Court. In response, Auffredou and the

---

7

Hereinafter John Salvador, Jr. and Kathleen A. Salvador, Plaintiffs-Appellants, are referred to either as "Salvadors" or "Appellants" and all Defendants-Appellees with the exception of Defendant-Appellee Martin Auffre-dou, are referred to collectively as "State" or "State Appellees". Defendant-Appellee Lake George park Commission hereinafter "Commission" and Defendant-Appellee Auffredou referred to as "Auffredou" or "Appellee Auffredou".

State ignore the violations of Salvadors' Constitutional rights which were the direct cause of the withdrawal of Salvadors' application to the Com-mission. This is akin to the situation encountered by plaintiff in *Palazzolo* v. *Rhode Island,* 121 S. Ct. 2448, Docket No. 99-2047, decided June 28, 2001, cited in Salvadors' Brief before this Court, but far exceeding the gravity and significance with respect to individual property rights in that recent case. At the least, Salvadors are entitled to discovery prior to any decision with respect to Auffre-dou's and the State's Motions. The vast majority of the documentation, records and evidence relat-ing to the matters at issue in the underlying action are solely and exclusively within the hands of the State. Access to this information, in particular discovery in the form of deposition, has been denied to Salvadors. Appellees raised issues relating to State Court litigation. Salvadors point out to this Court that they have no adequate State Court remedies in the State Court Enforcement action brought by the Commission on the TRO issue or on the continuing pending issue of request for judicial subpoenas in the State Court case for obtaining testimony and documents in the State Court case to defend on a hearing on the issue of permanent injunctive relief sought therein by the Com-mission. A proceeding under Civil Practice Law and Rules, ("CPLR"), Article 78 in the nature of mandamus or in the nature of prohibition is not appropriate. Prohibition does not lie since the State Court already granted the TRO and prohibition on that point is moot. Mandamus is not appropriate since the two issues before that Court for which it could be considered do not constitute either a duty which was not performed nor was it an anticipated act which it can be enjoined from performing. The State Court TRO issues are inextricably intertwined with the proof of the violation and continuing violation of Salvadors' Constitutional rights as well as the continuing denial of due process and equal protection by Appellees. Judicial Subpoenas are required

for the identified wit-nesses since they are State employees and the in-formation sought is "State information" and records. If Salvadors do not obtain the Judicial Subpoenas sought, the will be placed at a substantial disadvantage in defending a hearing on the TRO. There is no statutory time limit within which a State Court Judge must make a decision concerning the issuance or non-issuance of a Judicial Subpoena; therefore, the delay of over a year and one-half is excessive, there appears to be no legal basis upon which Salvadors can move to compel a State Court Judge to act in such instances, nor do they have any statutory basis for seeking the State Court Judge to hold a hearing with respect to the issuance of the Judicial Subpoenas requested. Salvadors are not in a position move before State Court to compel that Court to proceed to hearing on the TRO, since, without the testimony and evidence sought, Salvadors would go to hearing with the State hiding its witnesses and shielding its public documents and having no method of compelling their production. Despite document acquisition via FOIL, numerous documents are unavailable through that method, and no witness testimony can be obtained through FOIL. Salvadors must rely upon the Trial Court to direct by way of Judicial Subpoena, the production of witnesses and evidence solely in the hands of, or under the dominion and control of State. The remand of the State Court case brought by the Commission places Salvadors in a conundrum from which there is no exit.

Were Salvadors receiving the due process and equal protection to which they are entitled in the State Court action, they might have obtained at least a portion of the discovery material required in the instant action pending before this Court. They have no collateral source for obtaining that essential material; Auffredou and the State should not be allowed to rely upon such lack of information, as a basis for confirming the denial of such

Constitutional rights to Salvadors. The same is true with respect to the claims of immunity asserted by Appellees in response to Savladors' motion. As-suming Salvadors' pleadings are construed in the light most favorable to them, then the allegations set forth therein in that respect must be determined to establish an adequate basis to find Auffredou and individual State-Appellees, acting as "agents of the State", were knowingly engaged in *ultra vires* activities which are neither legal acts nor entitled to the protection of any claim of immunity.

How Auffredou and State can assert, with even an iota of sincerity, much less in good faith, that there is no factual predicate upon which Salvadors base their assertion under the ADA is incredible on its face. Whether or not individual Appellees named as Defendants in the instant action are or are not "persons" under ADA the ADA is irrelevant to Salvadors' allegations. The action stands under the correct legal interpretation of the ADA with respect to the facts of this case. As is fully briefed in Appellants' Brief, the lower Court's reading of *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 351 (2001), to extend the scope of the Supreme Court's interpretation of ADA therein to encompass this case which is not an action involving ADA in which the underlying premise is founded upon employment issues between the State and its employees, constitutes a distortion of the legal principles enunciated by the Supreme Court which cannot be arrived at without destruction of the inherent principles set forth by the Court in that case. Further, the claims enun-ciated in Salvadors' Complaint are specifically framed and clearly fall within the scope of liability wherein sovereign immunity is not applicable to protect State actions. As established under English common law and continuing to date, the fact that the sovereign, here the State, does not itself act, but is deemed to act through its designated servants, here State

employees, is an essential element in determination of how an action is to be pled and proved as against a State defendant. Acts of Auffredou and the agents-employees of State are what makes the State liable. It is untrue that "the Sovereign can do no wrong". It can and it does. That is precisely why statutes such as the ADA allow for actions against the State under circumstances in which, as here, sovereign immunity is not a valid or viable defense. The sovereign does not act itself, the State as here, acts through its employees. If the State is to assert any viable defense, then that defense would be that the actors, its employees exceeded, the authority vested in them by the sovereign State, and their acts, therefore, were *ultra vires*, under any interpretation, naming of the actors is essential since they are and must be necessary parties to any such action founded upon allegations of individual acts which by attribution are the acts of the sovereign State. This is particularly true with respect to attribution of intent, motivation and malice which cannot otherwise to be found in an inanimate non-human entity such as the "State". The allegations of alleged failure to establish discriminatory animus or ill-will asserted by State clearly is an issue requiring that Salvadors have an opportunity for discovery prior to any dismissal of this action. From an alternative prospective, the State can be viewed as an animate, living entity, when properly identified as a "person" in the truest sense of that word, that is the entire *persona* of the governed which "masses" are in fact the State. The fact that the State in its consistent treatment of Salvadors extends to them "special" treatment, different both in type and kind from that accorded the other members of the "unwashed masses" making up the State, is clear from the allegations detailed in Salvadors' papers. By point of information, "special" treatment is not always "better" treatment as is clearly established by the manner in which Auffredou and State consistently dealt with Salvadors. As a matter of public

record, of which this Court may take judicial notice, Salvadors have been involved in other prior litigation in which the Commission was a party. The consistent references to and the tenor of those references by State to other litigation establishes the underlying animus influencing, coloring and distorting Appellees', in particularly the Commission's view of Salvadors and anything they do. When the State addresses attribution of improper motivation with respect to Salvadors "disabled customers", they totally ignore the fact that Salvadors have in the past, and realistically anticipate to have in the future, handicapped employees. Apparently, Auffredou and the State view any handicapped employees hired by Salvadors as "guilty by association" with Salvadors and unworthy of having the benefits of the ADA accorded to them. Even criminals are entitled to a higher level of due process and equal protection under the laws than Appellees have grudgingly afforded Salvadors in Appellees' dealings with their nemesis Salvadors.

Salvadors also effectively have been denied their Constitutional rights of access to Federal Courts through the back-door implications of State Court controlling issues alleged by State and accepted below. Using smoke and mirrors, the State has distracted the Courts from consideration of the grave underlying issues of continual and consistent desperate treatment of Salvadors in their dealing with Auffredou, the Commission and other State entities involved. This is not a figment of Salvadors' imagination; it is not paranoia. It is fact, Salvadors, where ever possible have provided the Courts with documentary evidence of desperate treatment. By way of example, the statements made by Auffredou on the public record concerning the handling of Salvadors' application in a manner diametrically opposed to the manner in which the Commission had just handled another similar application,

provides only one detail supporting Salvadors' allegations. Salvadors are justified in believing that, were they granted discovery in this action, they would unearth numerous additional examples of such targeting, intensive and excessive scrutiny as compared to other applicants, and generally illegal and improper treatment of Salvadirs in their dealings with Appellees. If this Court determines that Salvadors have not already submitted more than adequate proof to defeat Auffredou's and State's motions, then Salvadors have documented more than sufficiently the basis for their request that discovery proceed here, necessitating denial both of Appellees' motions.

POINT III

AUFFREDOU IGNORES THE FACTS UNDERLYING THE INSTANT ACTION IN THEIR ALLEGATION THAT THERE IS NO CASE OR CONTROVERSY

The "case or controversy" issue has been considered with respect to Auffredou's allegations relative to jurisdictional issues above; Auffredou and State further distort the facts in this case. In Point 1of Auffredou's argument and also in State's, Appellees assert that Salvadors have not jumped through each and every administrative hoop, real and imagined to be required to proceed before Federal Court for adjudication of their claims. As the court found in *Palazzolo* v. *Rhode Island,* 121 S.Ct. 2448, Docket No. 99-2047, decided June 28, 2001, *supra,* such requirement applied in cases in which the procedures are overly burdensome to litigants are unnecessary and not required before a party can seek judicial relief. It is ludicrous for Salvadors to proceed further in pursuit of an administrative remedy. Not only has the result been "telegraphed" to them by statements of individual Appellees, they have been

informed by Auffredou and State's counsel repeatedly, that they shall be treated "differently" from others proceeding before the Commission, but that their past "sins" of challenging the Commission in court is to be revisited each time Salvadors seek any permit or otherwise seek any relief. Auffredou's demand, on behalf of the Commission that it be Salvadors personally and not the corporation operating the marina which was required to make application, stating in words or substance that he was requiring such application, not required of other applicants, so Salvadors' personal assets could be reached by the Commission, is discriminatory on its face, and establishing if not planned and intended total rejection by Auffredou of any application or relief sought by Salvadors, at least establishing his and State's clear intent to treat Salvadors and any application made by them in a discriminatory fashion violative of their Constitutional rights. If allowed, Auffredou and State will continue to force Salvadors to jump through administrative hoops, putting up new and additional obstacles for an indeterminate period of time. Auffredou may claim a lack of ripeness purportedly based upon incomplete status of any application, this not only specious, it should be found to constitute an attempted fraud on this Court. Auffredou and State know full well the history leading to this litigation. Auffredou's and State's unsuccessful race to the courthouse to file a State Court enforcement action against Salvadors, their clearly intentional acts of interference with the completion and use of the handicapped access and their blockage by whatever means of Salvadors' right to a hearing on the State TRO and Judicial Subpoenas, establishes facts which neither Auffredou nor Commission has disputed. They stand as a matter of record. The Salvadors properly rely on *Palazzo* with respect to administrative remedy exhaustion. The Supreme Court reviewing a decision relating to alleged violation of the Takings Clause of the Fifth Amendment as applied to the States through the Due

Process Clause of the Fourteenth Amendment, the Court reviewed issues requiring weighing of public purpose and private interests, including private property rights. The issue underlying this action rests upon the State's "taking" of Salvadors' "property right" in their pre-existing, non-revocable Permit to Operate a Marina. In *Palazzolo,* a property owner applied on at least two separate occasions for relief from regulations dealing with the public purpose of protection of coastal wetlands. One matter at issue was failure of the private property owner to pursue all possible administrative alternatives for relief repeatedly before resort to courts. The Court held under existing statutes and regulations it was highly unlikely the private property owner would succeed in pursuit of administrative remedies no matter how often applied for:

> The application fared no better with the Council than previous ones. Under the agency's regulations, a landowner wishing to fill salt marsh on Winnapaug Pond needed a "special exception" from the Council.. . . . [T]he Council said the beach club proposal con-flicted with the regulatory standard for a special exception. . . . To secure a special exception the proposed activity must serve "a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests." . . . . *Id.,* at 2456.

The same type of regulatory machinations existed to thwart the Rhode Island property owner as have been concocted for the operations of Auffredou and State. The impossibility of compliance with the regulatory hurdles artificially created by State for the grant of a permit, and the disparate methodology used by Appellees with Salvadors are so

narrow and preclusive they create a never ending bureaucratic circle of fire resulting in a regulatory environment in which regardless of, if or how many times the Salvadors applied for this relief, it would be denied by Appellees.

In *Palazzolo,* after failing to obtain any administrative relief, petitioner proceeded to court:

> Petitioner filed an inverse condemnation action in Rhode Island Superior Court, assert-ing that the State's wet land regulations, as applied by the Council to his parcel, had taken the property without compensation in violation of the Fifth and Fourteenth Amendments. See App. 45. The suit alleged the Council's action deprived him of "all economically beneficially use" of his property, *ibid.,* resulting in a total taking requiring compensation under *Lucas* v. *South Carolina Costal Council,* 505 U.S. 1003 (1992). *Id.,* at 2456.

Failing in state courts, petitioner sought review by the Supreme Court which, while finding that petitioner as owner of the property had not been denied *all* economic use of his property, was entitled to relief founded upon his other Constitutional arguments holding:

> The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U.S. 226(1897), prohibits the government from taking private property for public use without just compensation. . . [e]ven a minimal "permanent physical occupation of real property" requires

compensation under the Clause. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982). In *Pennsylvania Coal Co.* v *Mahon*, 260 U.S. 393(1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' . . . formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking."*Id.*,at 415. *Palazzolo, supra,* at 2457.

Continuing review of the basis used for Constitutional taking, the Supreme Court stated:

Since *Mahon*, we have given some, but not too specific guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking. First, we have observed, with certain qualification, see *infra* at 19-21, that a regulation which "denies all economically beneficial or productive use of land" will require compensation under the Takings Clause. *Lucas,* 505 U.S, at 1015[*Lucas* v *South Carolina Costal Council,* 505 U.S. 1003 (1992)]; see also id., at 1035 (Kennedy, J., concurring) *Agins* v.*City of Tiburon,* 447 U.S. 255, 261 (1980). There a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including th regulation's economic effect on the land-owner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government

> action. *Penn Central, supra,* at124 [*Penn Central Transp. Co.* v. *New York City,* 438 U.S. 104 (1978)]. These inquiries are in-formed by the purpose of the Takings Clause, which is to prevent the government from "forcing people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."*Armstrong* v *United States,* 364 US. 40, 49(1960).*Palazzolo,* at 2457-8.

The Court addressed two key questions, the first, ripeness of the controversy for judicial review, and the second, the claim of takings with respect to after acquired (post-statutory enactment) property. The issue or ripeness has been a consistent hurdle placed in Salvadors' path by Auffredou and State. The Supreme Court in *Palazzolo* enunciated the following:

> In *Williamson County Regional Planning Comm'n.* v. *Hamilton Bank of Johnson City,* 473 U.S. 172 (1985), the Court explained that requirement that a takings claim must be ripe. The Court held that a takings claim challenging the application of land-use regulations is not ripe unless "the government entity charge with implementing the regulations has reached a final decision regarding the application of the regulation to the property at issue." *Id.,* at 186. A final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of "all economically beneficial use" of the property, see *Lucas, supra,* at 1015, or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred, see *Penn Central, supra,* at 124. These matters cannot be

resolved in definitive terms until a court knows "the extent of permitted development on the land in question. *MacDonald, Sommers & Frates* v. *Yolo County*, 477 U.S. 340, 531 (1986). . . . [t]he Rhode Island Supreme Court held that petitioner had not taken the necessary steps to ripen his takings claim.

. . . . The Court reasoned that, notwithstanding the Council's denials of the applications, doubt remained as to the extent of development the Council would allow on petitioner's parcel. We cannot agree.

The Court based its holding in part upon petitioner's failure to explore "any other use for the property that would involve filling substantially less wet lands.". . . . [W]hile the Council rejected petitioner's effort to fill all of the wetlands, and then rejected his proposal to fill 11 of the wetland acres, perhaps an application to fill . . . 5 acres would have been approved. . . . [and] we cannot know for sure the extent of permitted development on petitioner's wetlands.

This is belied by the unequivocal nature of the wetland regulations at issue and by the Council's application of the regulations to the subject property. . . . The Council is permitted to allow the exception, however, only where a "compelling public purpose" is served. *Id.*, §130A(2). . . . There is no indication the Council would have accepted the application had petitioner's proposed beach club occupied a smaller surface area. To the contrary, it ruled that the proposed activity was not a "compelling public

purpose." App. 27; cf. *id.*, at 17 . . . .

Williamson County's final decision requirement "responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer." *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725, 738 (1997). While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened. . . .

. . . Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established. . . . . .Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision. *Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999).

With respect to the wetlands on petitioner's

> property, the Council's decisions make plain that the agency interpreted its regulations to bar petitioner from engaging in any filling or development activity on the wetlands. The rulings of the Council . . .interpreting the regulations at issue, the briefs, arguments ***and candid statements by counsel*** for both sides, leave no doubt on this point: . . . there can be no fill for any ordinary land use. . . .[n]o fill for its own sake; no fill for a beach club, . . . no fill for a subdivision; no fill for any likely foreseeable use. And . . . no structures and no development on the wetlands. Further permit applications were not necessary to establish this point. [Emphasis added] *Palazzolo, supra,* at .

In reaching its determination on the ripeness issue, the Supreme Court held:

> Ripeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use. *Palazzolo, supra,* at 2460.

In concluding consideration of ripeness in *Palazzolo,* the Supreme Court found:

> In concluding that *Williamson County*'s final decision requirement was not satisfied the State Supreme court placed emphasis on petitioner's failure to "appl[y] for permission to develop [the] seventy-four-lot subdivision" that was the basis for the damages sought in his inverse condemnation suit. . .

. The Council's practice,. . . is to consider a proposal only if the applicant has satisfied all other regulatory preconditions for the use envisioned in the application. The subdivision proposal that was the basis for petitioner's takings claim, they add, could not have proceeded before the Council without, at a minimum, zoning approval from the town of Westerly an a permit from the Rhode Island Department of Environmental Management allowing the installation of individual sewage disposal systems on the property. . . .

. . . . Petitioner was informed by the Council that he could not fill the wetlands; it follows of necessity that he could not fill and then build 74 single-family dwellings upon it. Petitioner's submission of this proposal would not have clarified the extent of development permitted by the wetlands regulations, which is the inquiry required under our ripeness decisions. . . . When a taking has occurred, under accepted condemnation principles the owner's damages will be based upon the property's fair market value, see *Olson* v. *United States,* 292 U.S. 246, 255 (1934); 4 J. Sackman, *Nichols on Eminent Domain* §12.01 (rev. 3d ed. 2000) - an inquiry which will turn, in part on restrictions on use imposed by legitimate zoning or other regulatory limitations, see *id.,* at §12C.03[1].

. . . . Where the state agency charged with enforcing a challenged land use regulation entertains an application from and owner and its denial of the application makes clear the extent of development permitted, and neither the agency nor a reviewing state court has cited non-compliance with reasonable

> state law exhaustion or pre-permit processes, see *Felder* v. *Casey,* 487 U.S. 131, 150-151 (1988), federal ripeness rules do not require the submission of further futile applications with other agencies. *Palazzolo, supra,* at 2461-2.

The Court succinctly stated the interpretation of the Takings Clause of the Fifth Amendment which realistically and adequately addresses the rights of those impacted by unfettered state action.

> The Takings Clause is not so quixotic. A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken. *Palazzolo, supra,* at 2463.
>
> . . . . . .
>
> He asserts, none the less, that he has suffered a total taking and contends the Council cannot sidestep the holding in *Lucas* "by the simple expedient of leaving a landowner a few crumbs of value." Brief for Petitioner 37. *Palazzolo, supra,* at 2464.

The Salvadors cannot even determine from the prior actions of State and Commission, what if any "crumb" State in its magnanimity might deign to tossed to them..

Auffredou and State's arguments that there is no "case or controversy" must fail.

POINT IV

APPELLANTS HAVE ALLEGED RELIEF ADEQUATE TO ESTABLISH CAUSES OF ACTION ENTITLING THEM TO RELIEF UNDER THE ADA AND FOR VIOLATIONS OF APPELLANTS CIVIL RIGHTS

The Supreme Court has held that governmental statutory action can result in destruction of "previously existing rights of property and contract." *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 413 (1922). The Court succinctly stated the applicable principle:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. . . .[O]bviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. *Id.,* 413.

Under the doctrine of *Ex Parte Young,* 209 U.S. 123 (1908), when state officials act in a manner which violates federal constitutional rights, those improper acts are considered not to be actions of the state, and injunctive or declaratory relief is available to plaintiffs in federal court and is not barred by the Eleventh Amendment. *HBP Associates* v. *Marsh,* 893 F.Supp. 271, 277 (S.D.N.Y 1995). Auffredou and State assert that the operation of the Eleventh Amendment provides them with the cloak of immunity;

they are in error. The Eleventh Amendment is not a bar to actions seeking *prospective* relief from the state treasury, only a bar to compensation from the state and its agencies for *retrospective* relief. *Ex Parte Young*, 209 U.S. 123 (1908); *Edelman* v. *Jordan*, 415 U.S. 651, 667-68 (1974) (prospective relief is permissible even though it produces an "ancillary effect" on the state treasury). This Court can issue not only prospective relief such as an injunction requiring conformity of future conduct to federal law, but can also rule that the Commission, as an agency of the State for the purposes of discriminatory actions under the color of State law, must pay for the prospective relief of bringing about the effective "taking" of Salvadors' property, denial of equal protection and due process, all being the proximate cause of the damage to Salvadors.

The Complaint in addition to naming the Commission, names Auffredou and other individual defendants pursuant to *Santiago* v. *New York State Department of Correctional Services*, 945 F. 2d 25 (2d Cir. 1991), *cert denied*, 112 S.Ct. 1168 (1992) establishing that the Eleventh Amendment does not apply when a plaintiff seeks damages (retrospective or prospective) against a public official in his or her personal capacity. *Scheuer* v. *Rhodes*, 416 U.S. 232, 237-38(1974); *Dube* v. *State University*, 900 F.2d 587, 595 (2d Cir. 1990). Salvadors' Complaint seeks both; it seeks relief from the named State parties and Auffredou in both their personal and official capacities, rendering Appellees' argument erroneous. Auffredou and State argue that no discriminatory animus has been alleged by Salvadors with respect an identified group. That conclusion is unfounded and erroneous. *Thornton* v. *City of Albany*, 831 F.Supp. 970, 981 (N.D.N.Y. 1993). As clearly stated in Salvadors' pleadings, Auffredou and State engaged in a consistent pattern of conduct targeting Salvadors, as persons who have

utilized their right to access to the Courts to protect their Constitutional rights. *Thornton, supra.* This course of conduct tracks through the Commission's dealings with Salvadors in the permitting process which prior to commencement of litigation by Salvadors against State entities, including the Commission, at which time, the tide turned, and Salvadors faced new, different and additional hurdles in the regulatory process, placed before them by Commission actors. In addressing validity of permitting ordinances and permitting fees for public speaking, parades and assemblies, the Supreme Court in *Forsyth County* v *Nationalist Movement,* 505 U.S.123 (1992), held that the enactment at issue was in violation of the Constitution. The county administrator in *Forsyth, supra,* was given broad discretion with respect to the determination of fees to be charged in specific instances for the issuance of permits and the ordinance further failed to provide necessary standards upon which the administrator was to base his determination. The same is true in the instant case. The creation of the Commission legislatively and effectively left in the unfettered hands of the Commission "legislating" authority through regulation adoption, which, as the Commission states in its papers cannot be displaced or superseded by either DEC or any other named State entity. *Forsythe* clearly delineated the requirements for such a statute to pass Constitutional scrutiny:

> Such a scheme, however, must meet certain constitutional requirements. It may not delegate ***overly broad licensing discretion*** to a government official. See *Freedman* v. *Maryland, supra* [380 U.S. 51 (1965)]. Further, any permit scheme controlling the time, place and manner of speech must not be based on the content of the message and must be narrowly tailored to serve a significant government interest,

and must leave open ample alternatives for communication. See *United States* v. *Grace*, 461 U.S. 171, 177 (1983). *Id.* at 130.

. . . . . .

The reasoning is simple: if the permit scheme "involves appraisal of facts, the exercise of judgment and the formation of an opinion," *Cantwell* v. *Connecticut*, 310 U.S. 296, 305 (1940), by the licensing authority, "the danger of censorship and of abridgement of our precious First Amendment freedoms is too great" to be permitted, *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 553 (1975). [Emphasis added] *Id.* at 131.

The manner in which Appellees, in particular Auffredou and Commission flagrantly flaunts the Commission's self-defined unfettered power allowing it to proceed with either no or conveniently changeable, standards or guidelines remove any claim of legitimacy of action by the Commission and in particular Auffredou with respect to Salvadors. The Commission's and Auffredou's actions violate Salvadors' Fourth, Fifth and Fourteenth Amendment rights and cannot withstand Constitutional scrutiny. Both the actions of Commission and of Auffredou establish the fact that they individually and collectively interpret laws, rules and regulations applied to Salvadors in a different and disparate manner that applied to others similarly situated. The purported "standards" for the application and interpretation of the statute, at best constitute a "movable feast" depending on whose property is at stake. The Supreme Court addressed interpretation:

Based on the county's implementation an construction of the ordinance, it simply cannot be

> said that there are any " narrowly drawn and definite standards, " *Niemotko,* 340 U.S. at 271 [*Niemotko* v. *Maryland*, 340 U.S. 268, (1951)], guiding the hand of the Forsythe County administrator. The decision how much to charge for police protection or administrative time - or even whether to charge at all - is left to the whim of the administrator. There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees. The First Amendment prohibits vesting of such unbridled discretion in a governmental official. *Id.* 132-133.

The Commission in its "variable" interpretation of their "rules" leaves Salvadors with no set basis upon which they could rely in their dealings with the Commission. With the Commission's creation which, reading applicable legislation in conjunction with the statements of the Commission in this action established a sub-rosa quasi-governmental, quasi-private entity which was effectively empowered to controlled the regulation of not only Lake George, but also any physically connected property and operations to which they can spread their bureaucratic tentacles, evading restrictions, by its status or non-status, to which it would be subjected if it were to claim wholly governmental status. The Commission's claimed "quasi"status, evaded limitations properly applicable to govern-mental entities, and sneaked under the tent for the purpose of cloaking itself with the legitimacy of governmental stature to claim "immunity", prerogative and

privilege. All resulting in the fact that none of the properly applicable regulating factors are placed on the actual operations of the Com-mission. In *Forsythe,* the Supreme Court quoting an earlier relevant decision noted:

> "It is not merely the sporadic abuse of power by the censor, but the pervasive threat inherent in its very existence, that constitutes the danger to freedom of discussion." *Thornhill* v. *Alabama,* 310 U.S. 88, 97 (1940). . . . [C]hallenge on the grounds that an ordinance delegates overly broad discretion to the decision maker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance him from doing so. *Id.,* at Footnote 10.

POINT V

SALVADORS HAVE STANDING TO MAINTAIN THE INSTANT ACTION; AFFREDOU AND STATE APPELLANTS CONVENIENTLY OMIT REFERENCE TO THE *EX POST FACTO* LAW, RULES AND REGULATIONS APPLIED TO THE SALVADORS

Salvadors applied for, obtained and operated under the laws, rules and regulations established by the DEC for operation of their marina promptly upon notification of those requirements. Appellants relied upon the specific written terms and conditions established by laws applicable to their marina operation. Once the "rules" were set and Salvadors complied therewith, Salvadors obtained property rights protected by equal protection and due process for the permit pursuant to which they have continuously operated.

To change the "rules" with respect to such permit and operation "in mid-stream" by enactment of laws, rules and regulations imposing new and additional requirements and limitations upon Salvadors is a clear "taking" of their established property rights in the operation of their marina under and in accordance with the issued DEC Marina Permit.

The opening sentence of Article I, § 10 of the United States Constitution states:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; Remit Bills of Credit; make any Thing but gold or silver Coin a tender in payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

The Commission's actions "advised" and directed by Auffredou, violated this Constitutional man-date. The creation and use of "moveable" standards when dealing with Salvadors, the Commission fails to comport with the standards enunciated applicable under this provision. In *Andrus* v *Allard,* 444 U.S. 51 (1979), established ownership of property brought with it a "bundle of rights":

> . . . where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety. *Id.,* 65-66.

Salvadors may have started their property ownership with a "full bundle" of rights, but with "special" disparate standards applied to them by the Commission, they are not left with the "full bundle"of rights, but with whatever the whim of the Commission and Auffredou determine they may retain. These actions must be found discriminatory and in direct violation of all rational interpretations of Equal Protection. The State and Auffredou claim Salvadors have not pursued all purported available administrative remedies. This interpretation is wrong. In *Yee v. City of Escondido*, 503 U.S. 519, 112 S. Ct. 1522 (1992), the Supreme Court enunciated:

> . . . [W]e must address respondent's assertion that a regulatory claim is unripe because petitioners have not sought rent increases. While respondent is correct that a claim that the ordinance effects a regulatory taking as applied to petitioners' property would be unripe for this reason, see *Williamson County Regional Planning Comm'n.* v. *Hamilton Bank of Johnson City*, 473 U.S. 72,186-197(1985), petitioners mount a facial challenge to the ordinance. They allege in this Court that the ordinance does not "'substantially advance'" a "'legitimate state interest,'" no matter how it is applied. See *Nollan* v. *California Costal Comm'n. Supra*, at 834 [483 U.S. 825 (1987)]; *Agins* v. *Tiburon*, 447 U.S.255, 260 (1980). As this allegation does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated, petitioners' facial challenge is ripe. See *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U.S. at 495 [*Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U.S. 470 (1987)] *Agins, supra*, at 260. *Yee, supra*, at

533-534.

In *Agins* v. *Tiburon,* 447 U.S. 255 (1980), the Court, evaluating takings arguments, found:

> . . . [the] determination that governmental action constitutes a taking is, in essence is a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest . . .[which] necessarily requires a weighing of private and public interests. *Id.,* 260-261.

Weighing of public versus private interests is necessary; when a balancing is undertaken Salvadors clearly are entitled to discovery to establish relevant applicable factual material to complete the process. The Supreme Court has held the nature of the governmental action involved is critical to any analysis in a takings case and by logical extension, is a necessary element in any challenge to a stat-ute which in part rests on establishment of unconstitutional takings, as in the instant case. *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922). The inconsistent application of its "rules" and "regulations" to Salvadors and to their property under Auffredou's advice, direction and counsel, which according to facts presented thus far in this litigation, failed to follow the Commission's own standards and methods.

CONCLUSION

The decision of the Court below should be reversed

and the matter remanded for discovery and for further proceedings as requested herein.

Dated: January 14, 2002

Respectfully submitted,
/s/_____
MADELINE SHEILA GALVIN
Bar Roll No. 101737
GALVIN AND MORGAN
Attorneys for Appellants
217 Delaware Avenue
Delmar, NY 12054
(518) 439-7734

CERTIFICATE OF COMPLIANCE

Madeline Sheila Galvin, one of Appellants' Attorneys, hereby certifies as follows:

The Word Count of the above Brief is **6,858** words based upon the word count function of Word Perfect Version 9, Law Office version. The number of lines contained in the above Brief is **537** lines based upon the same internal computerized count system. Both counts are within the limits allowed by the applicable Rules of this Court.

_____/s/ _____

MADELINE SHEILA GALVIN

State of New York

Supreme Court County of Warren

In the Matter of the Application Of
Dunham's Bay Boat Co., Inc. and
Frank J. Parillo,

Plaintiffs-Petitioners,

- against -

CCN: 56-1-99-0174

Index No.: 38303

The Town of Queensbury Planning Board, The Town of Queensbury, Craig Brown as Code Compliance Officer for the Town of Queenbury, Dunham's Bay Beach and Boat Club, John Salvador, Jr. and Kathleen A. Salvador,

Defendants-Respondents.

APPEARANCES: SHANLEY, SWEENEY, REILLY & ALLEN

Attorneys for the Plaintiffs-Petitioners

10 Thurlow Terrace

Albany, NY 12203
BY: MARK T. SWEENEY, ESQ.,
Of Counsel

GALVIN & MORGAN
Attorneys for Defendants-Respondents, Salvadors
217 Delaware Ave
Delmar, NY 12054
BY: JAMES E. MORGAN, ESQ.,
Of Counsel

MILLER, MANNIX & PRATT
Attorneys for Defendant-Respondents
Town of Queensbury Planning Board
The Town of Queensbury and Craig
Brown as Code Compliance Officer
For the Town of Queenbury
One Broad Street Plaza
P.O. Box 765
Glens Falls, NY 12801
BY: CATHI L. RADNER, ESQ.,
Of Counsel

Viscardi, J. The Petitioners-Plaintiffs, Dunham's Bay Boat Co., Inc. and Frank Parillo, seeks an order and judgment pursuant to Civil Practice Law & Rules §3001 and

§7806 declaring that the approval of the Respondents-Defendants' site plan application was arbitrary and capricious, declaring that the Respondent-Defendant Craig Brown, Queensbury Code Compliance Officer is prohibited from issuing a building permit to Respondents-Defendants Dunham's bay Beach and Boat Club and John Salvador, Jr. and Kathleen A. Salvador ("Salvadors") until all required permits and approvals, including but not limited to a variance from the Town of Queensbury Zoning Board of Appeals are obtained, and granting Petitioner-Plaintiffs' costs and disbursements.

The Petitioners-plaintiffs have also cross-moved for an order and judgment pursuant to Civil Practice Law & Rules §3211(g) dismissing the counterclaim by respondents-Defendants John Salvador, Jr. and Kathleen A. Salvador and awarding Petitioners-Plaintiffs' costs, attorneys fees and compensory damages.

The Salvadors sought to construct a ramp to allow emergency and handicap access to the water and beaches on their property which is zoned waterfront residential on which they operate Dunham's Bay Boat and Beach Club, a pre-existing non-conforming use. Due to the fact the proposed project called for hard surfacing within 50 feet of the lakeshore, the project was subject to site plan approval under the Town of Queensbury Zoning Ordinance.

The Salvadors submitted maps and drawings to the Queensbury Community Development Department and on May 26, 1999 filed their application for site plan review, including a short environmental assessment form, with the Town Planning Board. The project was referred to the Warren County Planning Board for review and that board

issued a recommendation that the project be approved. On or about June 22, 1999, the Community Development Department issued its recommendation for approval of the project with the condition that use and construction be in compliance with the Lake George Park Commission and other regulatory agencies. The Planning Board reviewed the application at its meeting and public hearing on June 22, 1999. The Salvadors at that meeting explained they intended to improve the present facility for the sole purpose of providing up to standard handicapped and emergency access facility which would continue to be limited to only dues paying members of the Beach Club and registered guests of the Dunham's Bay Lodge. Access would also be allowed for emergency vehicles and would allow fire fighters to draw water for fire fighting use.

The Planning Board conducted a State Environmental Quality Review Act (SEQRA") review which resulted in a negative declaration. The Planning Board approved the project with the condition that the use and construction be in compliance with the Lake George Park Commission and other regulatory agencies.

The Petitioners contend that the project is one for the construction and operation of an improved commercial boat launch. Petitioners contend that the proposed project is not a permitted use in a waterfront residential zone; that the project required a variance since it was an expansion of a non-conforming use; and that the Planning Board failed to take a hard look at the areas of relevant and environmental impacts upon the Shoreline of Lake George including placement of a paved road up to the concrete structures into the waters of Lake George, traffic on existing roadway, New York State Rt. 9L, diminution of the aesthetics of the area,

water quality due to run off, and whether the proposed use would comply with the zoning law. The Salvadors in response contend that their property has been used for years by ambulance, police and others involved in rescue or emergency situations at the south end of Lake George; that these emergency vehicles have experienced difficulty in maneuvering in this area due to its sandy condition; that they have had both employees and guests with physical handicaps at their property; that the handicapped persons attempting to enter and exit from vessels at their facility currently require assistance; and that the sandy nature of the soil hampers mobility of such handicapped persons. It is further contended that the handicapped usage would be limited to registered guests and members of the Bolton Beach Club and not a facility open to the public at large and that any expansion of their facility is that only those persons with physical and/or mental handicaps who were previously more limited in their ability to enjoy Lake George would be more able to enjoy the lake.

The Town contends that the petitioners have overstated the scope of the approval granted to the applicants by the Planning Board; that the approval granted by the Board was not to construct, install or operate a commercial boat launch, but only a modification of existing facilities to allow better handicap and emergency access by constructing a hard surface area using permeable wood decking. The town further contends that the applicants have not requested and the Planning Board has not granted any approval for any increased or new use of the subject premises and thus the site plan approval is specifically conditioned upon the applicants' compliance with Lake George Park Commission regulations or other regulatory agencies.

In an Article 78 proceeding the reviewing court will

not substitute its judgment for that of the Board or set the Board's determination aside unless it clearly appears to be arbitrary or contrary to the law (see, Matter of Brucia v. Planning Board of the Town of Huntington, 157 A.D.2d 657).

This court does not find the grant of approval will result in any increase in use or change of use than is what already permitted. The only difference is that the present uses may be more easily undertaken by dues paying members of the beach club and the guests of Dunham's Bay Lodge, handicapped and the non-handicapped. The Plaintiffs-Petitioners' claims of adverse environmental impact are conclusory and not supported by the record. The project as proposed consists of wooden bridge decking materials so that rain water will be diverted to or peculate into the ground below and thus should not increase runoff into the waters of Lake George. There is no greater permitted use being allowed and thus any environmental impact should be no-existent. Thus the Planning Boards issuance of a negative declaration following a review of the issues fulfilled its obligation under SEQRA.

The cross-motion to the extent it seeks to dismiss the counterclaim by the Salvadors is granted on the basis that it does not state a cause of action. With respect to Plaintiffs-Petitioners' claim for attorney's fees and costs, even if this counterclaim was a SLAPP (Strategic Law Suit Against Public Participation) suit, the decision to award attorney's fees and costs is discretionary rather than mandatary (see, Matter of West Branch Conservation Association, Inc. v. Planning Board of the Town of Clarkson, 222 A.D.2d 513, 115). The court declines to award attorney's fees and costs.

For the foregoing reasons it is the decision of this

court that the petition be dismissed and that Defendants-Respondents are entitled to a judgment declaring the approval of the Defendants-Respondents' site plan application was not arbitrary, capricious, or contrary to law. The counterclaim asserted by the Salvadors is also dismissed

Defendant-Respondent Town to submit order and judgment on notice without costs.

Dated: Ticonderoga, New York

October 22nd, 1999

/s/
J.S.C.